

SOLD BY
The CARSWELL CO.
Limited
PUBLISHERS,
PRINTERS, BOOKBINDERS, ETC.
TORONTO, Can.



Digitized by the Internet Archive
in 2016

THE
Ontario Law Reports

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1925

REPORTED UNDER THE AUTHORITY OF THE
LAW SOCIETY OF UPPER CANADA

VOL. LVII.

EDITOR:
EDWARD B. BROWN, K.C.

TORONTO:
CANADA LAW BOOK COMPANY, LIMITED,
LAW BOOK PUBLISHERS, 234 BAY STREET

1925.

Copyright (Canada), 1925, by The Law Society of Upper Canada.

JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE RIGHT HON. SIR WILLIAM MULOCK, K.C.M.G., P.C., C.J.O.

THE HON. JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM NASSAU FERGUSON, J.A.

“ “ ROBERT SMITH, J.A.

Second Divisional Court.

THE HON. FRANCIS ROBERT LATCHFORD, C.J.

“ “ WILLIAM RENWICK RIDDELL, J.A.

“ “ WILLIAM EDWARD MIDDLETON, J.A.

“ “ CORNELIUS ARTHUR MASTEN, J.A.

“ “ JOHN FOSBERY ORDE, J.A.

HIGH COURT DIVISION.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P., President.

“ “ HUGH THOMAS KELLY, J.

“ “ HAUGHTON LENNOX, J.

“ “ HUGH EDWARD ROSE, J.

“ “ WILLIAM ALEXANDER LOGIE, J.

“ “ HERBERT McDONALD MOWAT, J.

“ “ ROBERT GRANT FISHER, J.

“ “ WILLIAM HENRY WRIGHT, J.

“ “ DAVID INGLIS GRANT, J.

MEMORANDA.

IMPERIAL PRIVY COUNCIL.

On the 22nd June, 1925, The Hon. Sir William Mulock, K.C.M.G., Chief Justice of Ontario, was appointed a member of his Majesty's Privy Council.

APPOINTMENTS TO THE BENCH.

The Honourable William Renwick Riddell, a Judge of the High Court Division of the Supreme Court of Ontario, was on the 5th September, 1925, appointed a Justice of Appeal of the Second Divisional Court of the Supreme Court of Ontario, and *ex officio* a Judge of the High Court Division of the said Court.

David Inglis Grant, of the City of Toronto, in the Province of Ontario, Esquire, of Osgoode Hall, one of his Majesty's counsel, was on the 5th September, 1925, appointed a Judge of the High Court Division of the Supreme Court of Ontario, and *ex officio* a Judge of the Appellate Division of the said Court.

CALLED TO THE BAR.

18th June, 1925.

Harry James Holland, Oscar Edward Fleming, William Edward Haughton, Walter Mills Rowland, John Nickle Davis, William Weir Pollock, Francis Joseph Justin, Thomas Jefferson Darby, Dorius Richer, Sydney Tannenbaum, Hiram Fletcher Smith, James Taylor Gow, Solomon Charles Platus, Ivan Clayton Harris (with honours), Alexander Michael Ferriss, Ian Thompson Strachan, Kenneth Andrew Christie, James Leith Ross jun., Joseph Benjamin Solway, Harry Rosenthal (with honours), William Hutchinson Sparrow, Walter Gordon Thomson (with honours, Chancellor Van Koughnet and silver medals), Harold Beam Matchett, Franklyn Wood Fisher, Beverley Vallack Elliot, Harvey Eaton Hazlewood, Dalton Courtwright Wells, Gordon Albert Binkley (with honours), John Logan Sutherland, Kathleen Kane Lee, Frank Fingland, Clifford Earl Kitchen, Donald Forsyth MacLaren, Frederic James Hanna, William Mahaffy Blain (special, Sask.), Donald Filmur Gibson, Harry Mootry Brown.

17th September, 1923.

Clark McCredie, John O'Meara Trepanier, Edwin George Thompson, Newton Johnson Powell, Harrison Gordon Fraser, Ivan Burns Craig, Forbes Begue Geddes, William Udo Haberman, John William Forde, Allan Bertram Moore, Stanley Murray Chown, Hugh Henry Creswicke, Lorne Cecil Lee, Robert Irvin Ferguson, William Alfred Stilwell, Frederick Kent Jaspersen (with honours, C.R.M. Scholarship, and bronze medal), Donald Percy Guthrie (with honours), Frederick Arthur Dashwood, William Elliott Kelly, Gerald Moore Purcell, William Kitchen Brown.

15th October, 1925.

Paul Coursolles Brouse, Charles Maxwell Luke, Amos Hyman Brown, George Frank Glassford, Joseph Aspinall, Royce McCuaig, Harold Emerson Boston, Emily Frances Lynch, Thomas Dawson Delamere, John Meadows Marsh, Clarence Laverne Yoerger (with honours), Norman Clifford Thomas Howard, Harold McMonies Vance.

19th November, 1925.

John Percy Collyer, Campbell Grant, John Ross Hetherington, John Edward Start, Frederick Clarke Hastings, Thomas Joseph Day, John Keith Henry, Duncan Stuart Whyte, William McMaster Thompson jun., Louis S. Hyman, Roland Ayres Carscallen, Sydwell Alexander Valpy Martin, Harold Morley Carscallen, David Charles Howard, George Blaisdell Honey, Roland Frederick Wilson, Alfred Morris Wootton, William Nathan Winkler, George MacDonald Grant, Herman Joseph Fournier, Reginald Elbridge Nourse, Murdoch Leonard Martyn, Erastus William Grant, Frederick Thomas McDermott, Joseph Ward Foster, Archie Francis Gignac, Morley Breuls, Alexander MacKenzie Matheson (special, N.S.), Albert Edward Hugill, Foster Bullivant Eddy, William Hancock Johnston.

ERRATA.

Page 203, 5th line of catch-words, *for "8" read "g."*

Page 435, 2nd line from bottom, *for [1892] read [1899].*

Page 446, last line but one of head-note, *for (1912) read (1921).*

CASES REPORTED.

A.

Alger, Geary v.....	218
Allen v. Patterson.....	
.....(App. Div.)	287
Alyea v. Canadian National Railway Co.....(App. Div.)	665
American Footwear Co. v. Lancashire and General Assurance Co.(App. Div.)	305
Anthes Foundry Co. Ltd., Wojeik v.....(App. Div.)	286
Arena Gardens of Toronto Ltd., Toronto Hockey Club v.....(App. Div.)	610
Argue, Re Brown and.....	
.....(App. Div.)	297
Arnoldi v. Tremaine.....	
.....(App. Div.)	310
Attorney-General for On- tario, Orpen v.....(Chrs.)	164

B.

Babbitt v. Clarke.....	
.....(App. Div.)	60
Bank of Toronto v. Bennett..	
.....(App. Div.)	326
Bank of Toronto, Goodman and Attorney-General for Canada v. (App. Div.)	109
Banking Service Corporation Ltd., Toronto Finance Corporation Ltd. and Cook v.....	514
Bannerman v. Binks.....	265
Barnard, Rex v..(App. Div.)	397
Barnet, Martello v.....	
.....(App. Div.)	670

Barthelmes v. Bickell	
.....(App. Div.)	119, note
Beach v. Hydro-Electric Power Commission of On- tario.....(App. Div.)	603
Beau Monde Ladies' Tailor- ing Co. v. Garrett..(Chrs.)	256
Benn v. Hawthorne.....	
.....(App. Div.)	557
Bennett, Bank of Toronto v.	
.....(App. Div.)	326
Bennett v. Peattie.....	
.....(App. Div.)	233
Besinnett v. White	171
Bickell, Barthelmes v.....	
.....(App. Div.)	119, note
Bickell, Cutten v.(App. Div.)	113
Binks, Bannerman v.....	265
Boland v. Canadian Na- tional Railway Co.....	
.....(App. Div.)	619
British America Nickel Cor- poration Ltd. and Na- tional Trust Co. Ltd., M. J. O'Brien Ltd. v.....	
.....(App. Div.)	536
British Crown Assurance Corporation Ltd., Holda- way v.....(App. Div.)	70
Brown and Argue, Re.....	
.....(App. Div.)	297
Bryant Isard & Co., Re.....	
.....(App. Div.-Bkey.)	471
Busch, Rex v.....(Chrs.)	248
Button, Re.....(Chrs.)	161
Buttrum v. Udell.....	
.....(App. Div.)	97

C.

Calculus Co. Ltd., Re	
.....(Bkey.-App. Div.)	272
Campbell Flour Mills Co.	
Ltd. v. City of Peter-	
borough.....(App. Div.)	458
Canadian National Railway	
Co., Alyea v..(App. Div.)	665
Canadian National Railway	
Co., Boland v.(App. Div.)	619
Canadian National Railway	
Co., Hodges v.(App. Div.)	665
Chase, Ledyard v.	
.....(App. Div.)	268
Chomik, Rex v.....(Chrs.)	334
Clarke, Babbitt v. (App.Div.)	60
Clarkson, Martin v.....	499
Clarkson v. Smith & Gold-	
berg	251
Cluff Brothers, Re....(Bkey.)	662
Connor v. Cornell.....	
.....(App. Div.)	35
Crehan, Deacon v.	597
Culley Breay & Dover Ltd.,	
Kohen v.....(App. Div.)	533
Curry v. Farrell.(App. Div.)	451
Cutten v. Bickell.....	
.....(App. Div.)	113

D.

Davidson and Royal College	
of Dental Surgeons of	
Ontario, Re....(App. Div.)	222
Deacon v. Crehan.....	597
Deady, Doyle v.....	44
Dempsey and Midland Loan	
and Savings Co., Re.....	627
Denison v. Union Bank of	
Canada	374
Dennis, Imperial Bank of	
Canada v.....	203
Disney v. Howich.....	
.....(App. Div.)	365

Dominion Loose Leaf Co.	
Ltd. v. Manuel..(App.Div.)	84
Doty and Marks, Re.....	
.....(App. Div.)	623
Doyle v. Deady.....	44
Doyle, Goodison Thresher	
Co. v.....(App. Div.)	300
Doyle v. McKinnon.....	
.....(App. Div.)	104
Durham Hosiery Mills Ltd.,	
Milne v.....(App. Div.)	228

F.

Farrell, Curry v.....	
.....(App. Div.)	451
Fitzpatrick v. The King.....	178
Foley Gold Mines Co. Ltd.,	
Shatford v....(App. Div.)	221
Fox and City of Windsor,	
Re.....(App. Div.)	243
Frost Steel and Wire Co.	
Ltd. v. Lundy.....	494

G.

Gallimore, Harris v.	
.....(App. Div.)	673
Gamble, Re	504
Garrett, Beau Monde Ladies'	
Tailoring Co. v.(Chrs.)	256
Geary v. Alger.....	218
Giffen, Re.....	634
Goderich Elevator and Tran-	
sit Co. Ltd., Northern	
Grain Co. Ltd. v.....	
.....(App. Div.)	1
Goodison Thresher Co. v.	
Doyle.....(App. Div.)	300
Goodman and Attorney-Gen-	
eral for Canada v. Bank of	
Toronto.....(App. Div.)	109
Gough, Rex v....(App. Div.)	426
Grand Trunk Railway Sys-	
tem, New Ontario Colon-	
ization Co. Ltd. v.....	244

H.

Haig, Re.....(App. Div.)	129
Hamilton Board of Health, Mackie v.(App. Div.)	93
Harris v. Gallimore.....	
.....(App. Div.)	673
Hawthorne, Benn v.....	
.....(App. Div.)	557
Hazell, Re.....	166
Hazell, Re.....(App. Div.)	290
Head, Musson v.....	38
Heath and Rose, Re.....	
.....(App. Div.)	67
Hobbs Manufacturing Co. Ltd., Westenfelder v.....	
.....(App. Div.)	31
Hodges v. Canadian Na- tional Railway Co.....	
.....(App. Div.)	665
Holdaway v. British Crown Assurance Corporation Ltd.....(App. Div.)	70
Home Bank of Canada, Re, National Trust Co.'s Case	27
Howich, Disney v.	
.....(App. Div.)	365
Hudson Fashion Shoppe Ltd., Re.....(Bkey.)	505
Huffman v. Ross.....	
.....(App. Div.)	329
Hydro-Electric Power Com- mission of Ontario, Beach v.....(App. Div.)	603

I.

Imerson v. Nipissing Central Railway Co.....(App. Div.)	588
Imperial Bank of Canada v. Dennis	203

J.

James v. City of Toronto...	
.....(App. Div.)	322

K.

King, Re.....(App. Div.)	144
Kinnear, Wilson v.....	
.....(App. Div.)	679
Kohen v. Culley Breay & Dover Ltd.....(App. Div.)	533
Kohen, Stone v. (App. Div.)	579
Krepsky, Re Orr v.	
.....(App. Div.)	353

L.

Lancashire and General As- surance Co., American Footwear Co. v.	305
Langell, Post v.....(Chrs.)	200
Ledyard v. Chase.....	
.....(App. Div.)	268
Leftley v. Moffat.....	260
Levin, Murphy Wall Bed Co. of Detroit v... (App. Div.)	105
London Loan and Savings Co. of Canada Ltd. v. Union Insurance Co. of Canton Ltd.... (App. Div.)	651
Lundy, Frost Steel and Wire Co. Ltd. v.....	494

M.

McGregor and McIntyre Co. Ltd. v. Sterling Appraisal Co. Ltd.....(App. Div.)	485
Mackie v. Hamilton Board of Health.....(App. Div.)	93
McKinnon, Doyle v.....	
.....(App. Div.)	104
McLaughlin, Re National Trust Co. and.....	319
McLeod and City of Wind- sor, Re.....(App. Div.)	15
Manuel, Dominion Loose Leaf Co. Ltd. v.....	
.....(App. Div.)	84

Marks, Re Doty and.....	
.....(App. Div.)	623
Martello v. Barnet.....	
.....(App. Div.)	670
Martin v. Clarkson	499
Mathews v. National Trust Co. Ltd.....	657
Midland Loan and Savings Co., Re Dempsey and.....	627
Miles v. Ontario Equitable Life Insurance Co.....	343
Milne v. Durham Hosiery Mills Ltd.....(App. Div.)	228
Moffat, Leftley v.....	260
Moore, Re.....	530
Murphy Wall Bed Co. of Detroit v. Levin.....	
.....(App. Div.)	105
Murray, Noble Scott Ltd. v..	
.....(App. Div.)	248
Musson v. Head.....	38

N.

National Trust Co.'s Case, Re Home Bank of Canada	27
National Trust Co. Ltd., Mathews v.....	657
National Trust Co. and Mc- Laughlin, Re.....	319
National Trust Co., Robins v.....(App. Div.)	46
New Ontario Colonization Co. Ltd. v. Grand Trunk Railway System.....	244
Nipissing Central Railway Co., Imerson v.....	
.....(App. Div.)	588
Noble Scott Ltd. v. Murray..	
.....(App. Div.)	248
North York, Township of, Re Township of York and	
.....(App. Div.)	644

Northern Grain Co. Ltd. v. Goderich Elevator and Transit Co. Ltd.....	
.....(App. Div.)	1

O.

O'Brien (M. J.) Ltd. v. British America Nickel Corporation Ltd. and Na- tional Trust Co. Ltd.....	
.....(App. Div.)	536
Ollmann, Re.....(Chrs.)	340
Ontario Equitable Life In- surance Co., Miles v.....	343
Orpen v. Attorney-General for Ontario.....(Chrs.)	164
Orr v. Krepsky, Re.....	
.....(App. Div.)	353

P.

Patterson, Allen v.....	
.....(App. Div.)	287
Peattie, Bennett v.....	
.....(App. Div.)	233
Peterborough, City of, Campbell Flour Mills Co. Ltd. v.....(App. Div.)	458
Post v. Langell.....(Chrs.)	200
Pratt, Seymour v.....	278

R.

Rex v. Barnard.....	
.....(App. Div.)	397
Rex v. Busch.....(Chrs.)	248
Rex v. Chomik.....(Chrs.)	334
Rex, Fitzpatrick v.....	178
Rex v. Gough....(App. Div.)	426
Rex v. Clarence F. Smith....	
.....(App. Div.)	383
Rex v. Stewart. (App. Div.)	445
Rex v. West.....(App. Div.)	446
Rex v. Wood.....(App. Div.)	445
Rex ex rel. Scroggie v. Robb..	
.....(Chrs.)	23

Robb, Rex ex rel. Scroggie v.(Chrs.)	23
Robins v. National Trust Co.(App. Div.)	46
Rose, Re Heath and.....(App. Div.)	67
Ross, Huffman v.....(App. Div.)	329
Royal College of Dental Sur- geons of Ontario, Re Davidson and.(App. Div.)	222

S.

Sandwich East, Township of, v. Union Natural Gas Co.(App. Div.)	656
Scott, Re.....	381
Scroggie, Rex ex rel., v. Robb(Chrs.)	23
Sellors v. Woodruff.....(App. Div.)	582
Sexsmith, Re.....	283
Seymour v. Pratt.....	278
Shatford v. Foley Gold Mines Co. Ltd.(App. Div.)	221
Smith (Clarence F.), Rex v.(App. Div.)	383
Smith & Goldberg, Clark- son v.....	251
Stair and Yolles, Re.....	338
Sterling Appraisal Co. Ltd., McGregor and McIntyre Co. Ltd. v.....(App. Div.)	485
Stewart, Rex v..(App. Div.)	445
Stone, Re.....(Bkey.)	640
Stone v. Kohen..(App. Div.)	579

T.

Toronto, City of, James v.(App. Div.)	322
Toronto Finance Corpora- tion Ltd. and Cook v. Banking Service Corpora- tion Ltd.....	514

Toronto Hockey Club v. Arena Gardens of Toronto Ltd.....(App. Div.)	610
Tremaine, Arnoldi v.....(App. Div.)	310

U.

Udell, Buttrum v.....(App. Div.)	97
Union Bank of Canada, Denison v.	374
Union Insurance Co. of Can- ada Ltd., London Loan and Savings Co. of Canada Ltd. v.(App. Div.)	651
Union Natural Gas Co., Township of Sandwich East v.(App. Div.)	656

W.

West, Rex v.....(App. Div.)	446
Westenfelder v. Hobbs Manufacturing Co. Ltd.(App. Div.)	31
White, Besinnett v.	171
Wilson v. Kinnear.....(App. Div.)	679
Windsor, City of, Re Fox and.....(App. Div.)	243
Windsor, City of, Re Mc- Leod and(App. Div.)	15
Wojeik v. Anthes Foundry Co. Ltd.....(App. Div.)	286
Wood, Rex v.....(App. Div.)	445
Woodruff, Sellors v.....(App. Div.)	582

Y.

Yolles, Re Stair and.....	338
York, Township of, and Township of North York, Re(App. Div.)	644

CASES CITED.

A.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Ackerley, In re	[1913] 1 Ch. 510	156
Adamson, Ex p.	8 Ch. D. 807	330
Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.	3 O.L.R. 127	651, 653
Alabama New Orleans Texas and Pa- cific Junction Railway Co., In re. [1891]	1 Ch. 213	550
Alcock v. Royal Exchange Assurance Co.	13 Q.B. 292	410
Alderson v. Maddison	7 Q.B.D. 174	558
Alderson v. Watson	35 O.L.R. 564, 36 O.L.R. 502..	276, 277
Allen v. Gold Reefs of West Africa Ltd.	[1900] 1 Ch. 656. 537, 551, 554, 555	315
Allen v. Jarvis	L.R. 4 Ch. 616	421
Allen v. Roydhouse	232 Fed. Repr. 1010	[1894] 1 Q.B. 750....222, 223, 227
Allinson v. General Council of Medi- cal Education and Registra- tion	56 O.L.R. 559	583, 587
Amalgamated Society of Carpenters and Joiners v. Sinclair.....	13 O.L.R. 417	363
Ameliasburg, Town of, v. Pitcher, Re	14 Q.B.D. 606	502
Anderson, Ex p., In re Tollemache... 14	Q.B.D. 606	315
Anderson v. May	2 B. & P. 237	31, 33
Andreas v. Canadian Pacific Railway Co.	37 Can. S. C. R. 1	72
Anglo-American Fire Insurance Co. v. Hendry	48 Can. S.C.R. 577	457
Anglo-Russian Merchant Traders and John Batt & Co. (London)....	[1917] 2 K.B. 679	492, 493
Appleby v. Myers	L.R. 1 C.P. 615, L.R. 2 C.P. 651	558
Archibald v. McNerhanie	29 Can. S.C.R. 564	93, 95, 96
Ardagh v. County of York	17 P.R. 184	157
Aspdon v. Seddon	L.R. 10 Ch. 394, 397, note.....	282
Atkins, Re	81 L. T. R. 421	175
Attorney-General v. Leeds Corpora- tion	L.R. 5 Ch. 583	274, 276
Attorney-General for Canada v. Gor- don	56 O.L.R. 48	603, 604
Attorney-General for Manitoba v. Kelly	[1922] 1 A.C. 268	17
Attorney-General for Ontario v. At- torney General for the Dominion. [1896]	A.C. 348	17
Attorney-General for Quebec v. Reed.	10 App. Cas. 141	558
Austin & Nicholson v. Canada Steam- ship Lines Ltd.....	15 O.W.N. 371.....	274
Auto Experts Ltd., Re	49 O.L.R. 256, 1 C.B.R. 421 ...	36
Axford v. Prior	14 W.R. 611	

B.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Babbitt v. Clarke	57 O.L.R. 60	269
Badenach v. Inglis	29 O.L.R. 165	47
Badman Brothers v. The King	[1924] 1 K.B. 64	179, 188
Bailey v. Babcock	241 Fed. Repr. 501	421
Bailey v. Gould	4 Y. & C. Ex. 221	504
Bain v. Fothergill	L.R. 7 H.L. 158	453
Bank of Montreal v. Demers	29 Can. S.C.R. 435	200, 202
Bank of New Zealand v. Simpson...	[1900] A.C. 182	630
Bank of Toronto v. Lambe	12 App. Cas. 575	17, 21
Bank of the United States v. Dand- ridge	12 Wheat. 64	405
Barber v. McCuaig	31 O.R. 593	624, 626
Barker v. Edgar	[1898] A.C. 748	648
Barnett v. Cohen	[1921] 2 K.B. 461	616
Barry v. Butlin	2 Moo. P.C. 480	47
Barthelmes v. Bickell	62 Can. S.C.R. 599...113, 114, 115, 116, 117, 118, 119	
Bartholomew v. Freeman	3 C.P.D. 316	38, 40
Bartlett v. Vinor	Carth. 251	309
Barrett, Re	5 A.R. 206	511
Bateman v. County of Middlesex...	24 O.L.R. 84, 25 O.L.R. 137, 27 O.L.R. 122	558
Bath's Case	8 Ch.D. 334	603, 604, 607
Battle v. Fidelity and Casualty Co. of New York	54 O.L.R. 24, 55 O.L.R. 330..71, 351	
Beattie v. Barton	2 C.L.T. 104	258
Beatty v. Fitzsimmons	23 O.R. 245	365, 371
Beauchamp Brothers, In re	[1894] 1 Q.B. 1	644
Bennett v. Perrault	68 D.L.R. 164	558
Berlin, City of, and County Judge of the County of Waterloo, Re...	33 O.L.R. 73	459, 460, 466
Betts, In re	[1897] 1 Q.B. 50	642
Bigelow v. Craigellachie Glenlivet Distillery Co.	37 Can. S.C.R. 55	508
Biggar v. Rock Life Assurance Co..	[1902] 1 K.B. 516	71
Birkmyr v. Darnell	1 Smith's L.C., 12th ed., 335...	105
Black v. Imperial Book Co.	5 O.L.R. 184	176
Blair Open Hearth Furnace Co. Ltd., In re	[1914] 1 Ch. 390	503
Bligh v. Gallagher	57 D.L.R. 76	559
Bloom v. National United Benefit Savings and Loan Co.	152 N.Y. 114	421
Bloomenthal v. Ford	[1897] A. C. 156	333
Blundell, In re	40 Ch.D. 370	477
Bohrling v. Inglis	3 East 381	247
Bolton Partners v. Lambert	41 Ch.D. 295300, 301, 302, 303, 304	
Bond v. Treahay	37 U.C.R. 360	105
Boswell v. Crucible Steel Co.	[1925] 1 K.B. 119	108
Boughton v. Boughton	2 Ves. Sr. 12	132
Boughton v. Knight	L.R. 3 P. & D. 64	47
Bourassa, In re	4 C.B.R. 136	474, 476
Bowden Wire Ltd. v. Bowden Brake Co. Ltd.	30 R.P.C. 45, 580, 31 R.P.C. 385 495, 498	
Bowen v. Lewis	9 App. Cas. 890....136, 137, 139, 142	
Boyd v. Johnston	19 O.R. 598	371
Boyd v. Larson	42 D.L.R. 516	48
Boyes v. Cook	14 Ch.D. 53	147

NAME OF CASE.	WHERE REPORTED.	PAGE.
Bradley v. Archibald	[1899] 2 I.R. 108	90
Bradley v. Barber	30 O.R. 443	87
Bragg v. Oram	46 O.L.R. 312.....	85, 86, 87, 88, 92
Brewster v. Kitchin	Comberbach 424	290, 295
Bridges v. Smyth	5 Bing. 410	624
Briggs v. Spaulding	141 U.S. 132	421
British Columbia Electric Railway Co. v. Vancouver Victoria and Eastern Railway and Navigation Co.	[1914] A. C. 1067	620
British and Foreign Bible Society v. Shapton	7 O.W.N. 658	151
Britton v. Milsom.....	19 A.R. 96	326, 329
Brock v. Crawford	11 O.W.R. 143	261, 263
Brock v. United States Fidelity and Guaranty Co.	20 O.W.N. 278	71
Broughton v. Broughton	5 DeG. M. & G. 160....	476, 480, 482
Brown v. British Abrasive Wheel Co. Ltd.	[1919] 1 Ch. 290	551, 555
Brown v. Sewell	16 Ch.D. 517	164, 165
Brown v. Wood	12 P.R. 198	679, 680
Bryant v. City Dairy Co., Re.....	50 O.L.R. 40	354, 363
Bryant Isard & Co., Re, Ex p. Hig- ginson	4 C.B.R. 41, 24 O.W.N. 597....	476
Buck v. Eaton	17 O.W.N. 191	325
Buckworth v. Thirkell	3 B. & P. 652, note.....	290
Bull v. Frank	12 Gr. 80	195
Burdett v. Thompson	L.R. 3 P. & D., 72, note	47
Burgh v. Legge	5 M. & W. 418	329
Burland v. Earle	[1902] A.C. 83	551
Burland v. The King	[1922] 1 A.C. 215	17, 21, 22
Burson v. German Union Insurance Co.	10 O.L.R. 238	305, 309
Byrne v. Boadle	2 H. & C. 722	32

C.

Caldicott, Ex p.....	25 Ch.D. 716	254
Campeau v. May	2 O.W.N. 1420	61
Canada Central Railway Co v. The Queen	20 Gr. 273	179, 180, 193, 195
Carter v. Durham Hosiery Mills Ltd.	Unreported	230
Cavalier v. Pope	[1906] A.C. 428	32, 35
Cameron v. Cuddy	[1914] A.C. 651	604
Cameron v. Stevenson	12 U.C.C.P. 389	664
Campbell v. Campbell	130 Ill. 466.....	47
Campbell v. Douglas	34 O.L.R. 580	373
Canadian National Fire Insurance Co. v. Colonsay Hotel Co.	[1923] S.C.R. 688	154
Canadian National Railway Co. v. Croteau	[1925] S.C.R. 384	620
Canadian Pacific Railway Co. v. Fleming	22 Can. S.C.R. 33.....	588, 593
Castello v. London General Omnibus Co. Ltd.	107 L.T.R. 575	551
Caton v. Caton	L.R. 1 Ch. 137	558
Central Bank of Canada, Re, Wat- son's Case	15 P.R. 427	258
Chambers v. Winchester	15 O.L.R. 316	460, 467
Chandler v. Gibson	2 O.L.R. 442	130, 131, 140, 142, 143

NAME OF CASE.	WHERE REPORTED.	PAGE.
Chaplin v. Hicks	[1911] 2 K.B. 786	617
Charter v. Charter	L.R. 7 H.L. 364	157
Cherniak and College of Physicians and Surgeons of Ontario, Re....	46 O.L.R. 434	223, 227
Chisholm v. Doulton	22 Q.B.D. 736	390
Christophers v. White	10 Beav. 523	480
City Equitable Fire Insurance Co. Ltd., In re	40 Times L.R. 664, 753.....	383, 392, 397, 399, 410, 422, 436
Clack v. Carlon	7 Jur. N.S. 441, 30 L.J. Ch. 639 476, 481	
Clarke v. The Queen	1 Can. Ex. C.R. 182.....	179, 189, 194
Clarkson v. Dominion Bank	58 Can. S.C.R. 448.....	378, 379
Clarkson v. Robinet	27 O.W.N. 346	253, 254
Clifford v. Brooke	10 Ir. R.C.L. 179	136
Clifford v. Koe	5 App. Cas. 447.....	138
Cochrane, In re	16 O.L.R. 328	147
Cochrane, Town of, and Cowan, Re.	50 O.L.R. 169.....	17
Coffin v. North American Land Co..	21 O.R. 80	270
Collett v. Collett	1 Curteis 678	102
Columbus Co. Ltd. v. Clowes.....	[1903] 1 K.B. 244	493
Commings v. Scott.....	L.R. 20 Eq. 11	43
Connec v. North American Railway Contracting Co.	13 P.R. 433	165
Cook v. Deeks	[1916] 1 A.C. 554	551
Cooper and Knowler, Re.....	19 O.W.N. 27, 123.....	169
Cope v. Cope	1 Moo. & R. 269.....	299
Cope v. Rowlands	2 M. & W. 149	309
Corbet v. Johnson	10 A.R. 564	616
Corbin v. Thompson	39 Can. S.C.R. 575	616
Cordery v. Colville	32 L.J.C.P. 210	329
Corsellis, In re	34 Ch.D. 675	476, 482
Costa Rica, Republic of, v. Strous- berg	16 Ch.D. 812	258
Cotton v. The King	[1914] A.C. 176	17, 21
Coulter v. Equity Fire Insurance Co..	9 O.L.R. 35	72
Couper v. Whitson	9 Ct. Sess. (4th ser.) 1115	421
Cowen, Ex p.	L.R. 2 Ch. 563.....	537, 551, 554, 555
Cradock v. Piper	1 Mac. & G. 664	482
Craig v. McKay	8 O.L.R. 651	306
Craven v. Smith	L.R. 4 Ex. 146	230
Crichton, Re	13 O.L.R. 271.....	223, 226, 227
Crombie v. The King	52 O.L.R. 72	179, 188
Cross v. Cleary	29 O.R. 542	558, 563
Crowther v. Elgood	34 Ch.D. 691	580
Cummings and County of Carleton, Re	25 O.R. 607	363
Cutter, Re	37 O.L.R. 42.....	151
Cutter v. Powell	2 Sm. L.C., 12th ed., p. 1.....	491
Czarnikow v. Roth Schmidt & Co....	[1922] 2 K.B. 478	604

D.

D. v. W.	3 O.W.N. 993	260
Dafen Tinplate Co. Ltd. v. Llanelly Steel Co. (1907) Ltd.....	[1920] 2 Ch. 121	551, 555
Dakin (II.) & Co. Ltd. v. Lee.....	[1916] 1 K.B. 566.....	485, 491, 492
D'Allax v. Jones	26 L.J. Ex. 79	309
Daly v. Brown	39 Can. S.C.R. 122	659
Davenport v. Bishopp	2 Y. & C. Ch. 451, 1 Phil. 698..	638

NAME OF CASE.	WHERE REPORTED.	PAGE.
Davey v. Robinson	[1923] 1 K.B. 563	91
Davis, Re	26 O.W.N. 426, 4 C.B.R. 698.274, 276	
Davis v. Henderson	29 U.C.R. 344	61
Debtor, In re A.	[1908] 1 K.B. 344	112
Deedes v. Graham	16 Gr. 167	148
De Forrest v. Bunnell	15 U.C.R. 370	376
DeHaber v. Queen of Portugal	17 Q.B. 196	362
Delafield v. Parish	25 N.Y. 9	47
Denew v. Daverell	3 Camp. 451	493
Denham & Co., In re	25 Ch. D. 752.....	404, 421
Denne v. Light	3 Jur. 627	453
Dennis v. Reilly	[1898] 1 Q.B. 1	112
Deremore v. Trusts and Guarantee Co. Ltd.	[1919] 1 W.W.R. 681	47
Derry v. Peek.....	14 App. Cas. 339, 58 L.J. Ch. 864	230
Desmarais v. London Guarantee and Accident Co.	25 Rev. Leg. N.S. 301.....	72
Detroit, Mayor of, v. Moran	7 N.W. Repr. 180	158
DeVault v. Robinson	48 O.L.R. 34	60, 63
Devaynes v. Robinson	24 Beav. 86	267
Deverell v. Milne	[1920] 2 Ch. 52	87, 90
Dicken v. McKinley	163 Ill. 318	558
Dickson v. J. A. Scott Ltd.	30 Times L.R. 256	36
Dillon v. Scofield	9 N.W. Repr. 554	405
Direct Photo Engraving Co. v. Martin.	[1921] 2 K.B. 187	580
Ditton, Ex p.	13 Ch.D. 318	311, 316
Dixon, Ex p.	13 Q.B.D. 118	642
Dixon v. Evans	L.R. 5 H.L. 606	607
Dodson v. Downey	[1901] 2 Ch. 620	371
Doe, Re	16 D.L.R. 740	17
Doe dem. Henderson v. Seymour....	9 U.C.R. 47	195
Doe dem. Henderson v. Westover....	1 E. & A. 465.....	195
Dombey & Son Ltd. v. Playfair Brothers	[1897] 1 Q.B. 368	624, 625
Dominion of Canada Freehold Estate and Timber Co. Ltd., Re.....	55 L.T.R. 347	550
Dominion Shipbuilding and Repair Co. Ltd., Re.....	53 O.L.R. 485.....	377
Dominion Sugar Co. v. Northern Pipe Line Co.	47 O.L.R. 119	657
Donnelly v. Broughton	[1891] A.C. 435	47
Doody, In re	[1893] 1 Ch. 129	476, 480, 482
Dovey v. Cory	[1901] A.C. 477 . 383, 389, 390, 392, 397, 399, 410, 416, 418, 422, 423	
Dowdy v. General Animals Insurance Co.	33 O.L.R. 258	72
Downes v. Grazebrook	3 Mer. 200	267
Foyle v. Diamond Flint Glass Co....	10 O.L.R. 567	352
Drawmer, In the Estate of	108 L.T.R. 732	678
Dresser v. Bates	250 Fed. Repr. 525	421
Drew v. Martin	2 H. & M. 130	635, 638
Drughorn (Fred.) Ltd. v. Rederiak- tiebolaget Transatlantic	[1919] A.C. 203	42
Duckworth and Skinkle, Re	55 O.L.R. 272	297, 300
DuCros v. Lambourne	[1907] 1 K.B. 40, 46	408
Dudley Corporation, In re.....	8 Q.B.D. 86	460
Dunham's Appeal	27 Conn. 192	102

NAME OF CASE.	WHERE REPORTED.	PAGE.
Du Pasquier v. Cadbury Jones & Co. Ltd.	[1903] 1 K.B. 104.....	87
Dworkin v. Globe Indemnity Co. of Canada	51 O.L.R. 159.....	71, 82, 84
Dyer v. Evans, In re	30 O.R. 637	363
Dykes v. Blake	4 Bing, N.C. 463	453

E.

Eacrett v. Kent	15 O.R. 9	277
Ebsworth v. Alliance Marine Insurance Co.	L.R. 8 C.P. 596.....	654
Eddy v. Eddy	Countlée's Digest, p. 130.....	202
Edmundson v. Thompson	31 L.J.N.S. Ex. 207.....	333
Eisen v. McCabe Ltd.	57 Sc. L.R. 126, 534.....	309
Electrical Development Co. of Ontario v. Attorney-General for Ontario	[1919] A.C. 687	604, 606
Ellis v. Cary	74 Wis. 176.....	558
England v. Lamb	42 O.L.R. 60	95
Errington v. Court Douglas Canadian Order of Foresters, Re	14 O.L.R. 75	363
Erskine v. Adeane	L.R. 8 Ch. 756.....	558
Etter v. City of Saskatoon	39 D.L.R. 1	325
Eubanks v. The State	114 Pac. Repr. 748.....	405
Evans v. Davies	[1893] 2 Ch. 216	38, 40

F.

Farnsworth v. Garrard	1 Camp. 38	492
Farquharson v. Morgan	[1894] 1 Q.B. 552	362
Fashion Shop Co., Re	33 O.L.R. 253.....	277
Faulkner v. Faulkner	44 O.L.R. 634, 46 O.L.R. 69....	47
Fawcett and Holmes's Contract, In re	42 Ch.D. 150	174
Fidelity and Casualty Insurance Co. v. Mitchell	36 D.L.R. 477	72
Fidelity Oil and Gas Co. v. Janse Drilling Co.	27 D.L.R. 651	328
Filby v. Hounsell	[1896] 2 Ch. 737	39, 43
Finney v. Grice	10 Ch.D. 13	106
Fisher v. Bradshaw	2 O.L.R. 128	376
Fisher v. Cox	57 D.L.R. 567	492
Fleck, Re	55 O.L.R. 441	144, 578
Fleming v. Bank of New Zealand....	[1900] A.C. 577	303
Fleming v. Canadian Pacific Railway Co.	31 N.B.R. 318	593
Fleming v. Toronto Railway Co....	25 O.L.R. 317	407, 408
Flexlume Sign Co. v. Macey Sign Co.	51 O.L.R. 595	179, 187, 188
Follit v. Eddystone Granite Quarries.	[1892] 3 Ch. 75	551
Forman & Co. Proprietary v. Ship Liddesdale	[1900] A.C. 190	492
Formby Brothers v. Formby	102 L.T.R. 116	42
Fountaine v. Carmarthern Railway Co.	L.R. 5 Eq. 316	503
Frailey v. Charlton	[1920] 1 K.B. 147	390
Franklin v. Carter	1 C.B. 750	624
Fraser, In re	[1892] 2 Q.B. 633	333
Frost v. Knight	L.R. 7 Ex. 111	452
Fulton v. Andrew	L.R. 7 H.L. 448	48

G.

NAME OF CASE.	WHERE REPORTED.	PAGE.
Gallinger v. Gallinger	48 O.L.R. 590	558
Gamble and Robinson and City of Sault Ste. Marie, Re	54 O.L.R. 93	16
Gardiner, In re	20 Q.B.D. 249, 58 L.T.R. 119...	640
General Accident Assurance Corporation v. Noel	[1902] 1 K.B. 377	602
General Billposting Co. Ltd. v. Atkinson	[1909] A.C. 118	598, 601
Gibson and City of Hamilton, Re....	45 O.L.R. 458	16, 20
Gillett (E. W.) & Co. Ltd. v. Lumsden	[1905] A.C. 601	200, 201, 202
Ginger v. White	Willes 348	139
Godefroy v. Jay	7 Bing. 413	493
Godfrey v. Cooper	46 O.L.R. 565	322, 324, 325
Godson and City of Toronto, In re..	16 O.R. 275, 16 A.R. 452, 18 Can. S.C.R. 36	460, 467
Golding v. Wharton Saltworks Co....	1 Q.B.D. 374	579, 580
Goodfellow v. Nelson Line (Liverpool), Ltd.	[1912] 2 Ch. 324	550, 554
Goodill v. Brigham	1 B. & P. 192	169, 290, 292
Gordon v. Gordon	[1903] P. 141	297, 298, 299
Gould v. Mansfield	103 Mass. 408	558
Gowland v. Hamilton Grimsby and Beamsville Electric Railway Co.	33 O.L.R. 372	593
Grand'mère, Town of, v. L'Hydroaulique de Grand'mère	Q.R. 17 K.B. 83	453
Grand Trunk Railway Co. v. Hainer.	36 Can. S.C.R. 180	593
Grand Trunk Railway Co. v. McKay.	34 Can. S.C.R. 81	593
Grant v. Fuller	33 Can. S. C. R. 34....	130, 131, 142
Grant v. Morton	57 N.S.R. 300	61
Grass v. Allan, In re	26 U.C.R. 123	363
Gratwick's Trusts, In re	L.R. 1 Eq. 177	151
Great Central Railway Co. v. Banbury Union	[1909] A.C. 78	604
Green's Settlement, In re	L.R. 1 Eq. 288	234
Gregory v. Williams	3 Mer. 582	638
Gregson v. Taylor	[1917] P. 256	48
Grey v. Pearson	6 H.L.C. 61	159
Grieve v. Grieve	L.R. 4 Eq. 180	138
Griffith v. Brown	5 A.R. 303	60, 61, 64
Guy v. Grand Trunk Railway Co., Re.	10 P.R. 372	362
Gwyn v. Neath Canal Navigation Co.	L.R. 3 Ex. 209	630

H.

Haish v. Munday	12 Ill. App. 539	48
Haldenby v. Spofforth	1 Beav. 390	267
Hamilton v. Lethbridge	14 C.L.R. (Australia) 236. 598, 602	
Hamilton v. Perry, Re	24 O.L.R. 38	365
Hamlyn v. Talisker Distillery	[1894] A.C. 202	511
Hammersley v. Baron de Biel	12 Cl. & F. 45	559
Hammond v. Keachie	28 O.R. 455	373
Handley v. Archibald	30 Can. S.C.R. 130	60, 63
Hanson, Ex p.	12 Ves. 346, 18 Ves. 232	251, 255
Harnwell v. Parry Sound Lumber Co.	24 A.R. 110	597, 599
Harris v. Mudie	7 A.R. 414	61, 269
Hart v. Alexander	7 Car. & P. 746	330
Hart & Co. v. Michael	89 L.T.R. 422	453
Harvey v. Facey	[1893] A.C. 552	509, 510

NAME OF CASE.	WHERE REPORTED.	PAGE.
Harwood v. Baker	3 Moo. P.C. 282	47
Hastings (Lord) v. North Eastern Railway Co.	[1899] 1 Ch. 656	632, 633
Hedley v. Bates	13 Ch.D. 498	460
Heilbut, Symons & Co. v. Buckleton.	[1913] A.C. 30	436, 557, 560
Heller v. Niagara Racing Association.	56 O.L.R. 355	451, 454
Henderson v. McIver	3 Mad. 275	474
Hensley v. Hilton	131 N.E. Repr. 38	558
Hett, In the Goods of	6 Jur. 350	678
Hewson v. Macdonald	32 U.C.C.P. 407	344, 352
Hibbert v. Home Bank of Canada.	20 O.L.R. 651	216
Higgins v. Dawson	[1902] A.C. 1	147, 150, 151, 156
Hill v. Manchester and Salford Water Works Co.	5 B. & Ad. 866	389
Hilton v. Tipper	18 L.T.R. 626	456
Hochster v. De la Tour	2 E. & B. 678	452
Hodge v. Attorney-General	3 Y. & C. Ex. 342	189
Hodges v. Goodenough	9 Sask. 124	152
Hodgson, Re	50 O. L. R. 531.	657, 659, 660, 661
Hodson v. Heuland	[1896] 2 Ch. 428	558
Hodson v. Midland Great Western Railway Co.	Ir. R. 11 C.L. 109	48
Holland v. Holland	41 Times L.R. 431	298
Hong Kong and China Gas Co. Ltd. v. Glen	[1914] 1 Ch. 527	527
Hood v. Caldwell	50 O.L.R. 384, [1923] S.C.R. 488 514, 525, 526, 527, 528	528
Hooper v. Till	1 Doug. 198	315
Hoover-Owens Rentschler Co. v. Gulf Navigation Co. Incd.	24 O.W.N. 614	106, 108
Horton v. Stegmyer	175 Fed. Repr. 756	558
Houldsworth v. City of Glasgow Bank	5 App. Cas. 317	228, 232
House Repair and Service Co. Ltd. v. Miller	49 O.L.R. 205	492
Huddleston, In re	[1894] 3 Ch. 595	147, 148, 154
Huffman v. Rush	7 O.L.R. 346	61
Humble v. Hunter	12 Q.B. 310	42
Humphery v. Humphery	36 L.T.R. 91	148
Humphreys v. Green	10 Q.B.D. 148	558
Hunt v. Cope	Cowp. 242	457
Hunt and Lindensmith, Re	51 O.L.R. 320	298
Hunter v. Boyd.	3 O.L.R. 183	95

I.

Imperial Mercantile Credit Associa- tion, Liquidators of, v. Coleman.	L.R. 6 H.L. 189.	476, 478, 482
Indermaur v. Dames	L.R. 1 C.P. 274, L.R. 2 C.P. 311 32, 34, 35, 36, 37	
Inglis v. Robertson	[1898] A.C. 616	512
Initiative and Referendum Act, In re.	[1919] A.C. 935	656
Innes v. Sayer	3 Mac. & G. 606	154
Ireland v. Livingston	L.R. 5 H.L. 395	12
Irwin v. Campbell	51 Can. S.C.R. 358	604

J.

Jackson & Bassford Ltd., In re.	[1906] 2 Ch. 467	513
Jackson v. Hughes	2 O.W.N. 15	87

NAME OF CASE.	WHERE REPORTED.	PAGE.
Jackson v. Shoonmaker	2 Johns. (N.Y.) 230	269
Jacob, In re, Mortimer v. Mortimer..	[1907] 1 Ch. 445	157
James v. Kynnier	5 Ves. 108	254
James's Trade Mark, In re	31 Ch.D. 340	495
John v. Bacon	30 L.J.C.P. 365	36
Johnson, Ex p.	6 P.R. 225	338, 339
Johnson, Ex p., In re Chapman	26 Ch.D. 338	374, 376
Johnson v. Allen	26 O.R. 550	409
Johnson and Weatherall, In re.....	37 Ch.D. 433	317
Jones, In re	[1910] 1 Ch. 167	131, 138
Jones v. Carter	15 M. & W. 718	624
Jones v. Davies	[1901] 1 K.B. 118	298
Jones v. Harris	L.R. 7 Q.B. 157	376
Jones v. Hough	5 Ex. D. 115	48
Jones v. James, In re	19 L.J.N.S. Q.B. 257.....	362, 363
Jones & Son v. Whitehouse	[1918] 2 K.B. 61.....	310, 311, 313, 317, 318
Jubilee Cotton Mills Ltd., Official Re- ceiver and Liquidator of, v. Lewis	[1924] A.C. 958	503

K.

Katzman v. Ownahome Realty Co...	[1924] S.C.R. 18	41
Kay v. Wilson	2 A.R. 133	61
Keates v. Woodward	[1902] 1 K.B. 532.....	85, 87, 89, 90
Kelly v. Powlet	2 Ambl. 605	107
Kemerer v. Watterson	20 O.L.R. 451	110
Kemptville, Village of, v. Kemptville Milling Co.	27 O.W.N. 90	86
Kendall v. Hamilton	4 App. Cas. 504	253
Kensington v. Inglis	8 East 273	407
Kiersen v. Joseph R. Thompson & Sons Ltd	[1913] 1 K.B. 587	580
Kijko v. Baczski	51 O.L.R. 225	298
Kimber v. Gas Light and Coke Co....	[1918] 1 K.B. 439	36
Kinahan & Co. Ltd. v. Parry	[1910], 2 K.B. 389, [1911] 1 K.B. 459	43
Kingston Cotton Mill Co., In re (No. 2)	[1896] 2 Ch. 279	423
Kinsman v. Kinsman	4 O.W.N. 20, 7 D.L.R. 31.....	558
Kitchen v. Shaw	6 A. & E. 729	342
Komer, In re	5 C.B.R. 515, 27 O.W.N. 467..	508, 513

L.

La Blanche v. London and North Western Railway Co	34 L.T.R. 667	457
Labuan and Borneo Ltd., In re.....	18 Times L.R. 216	550
Lake Erie and Detroit River Railway Co. v. Sales	26 Can. S.C.R. 663.....	305, 306, 307, 309
Lakeman v. Mountstephen	L.R. 7 H.L. 17	104
Lamb v. Brown	54 O.L.R. 443	47
Lancashire Asylums Board v. Man- chester Corporation	[1900] 1 Q.B. 458	648
Land Cred't Co. of Ireland v. Lord Fermoy	L.R. 5 Ch. 763	421
Lands Allotment Co., In re	[1894] 1 Ch. 616.....	405, 421
Lane v. City of Toronto	7 O.L.R. 423	467

NAME OF CASE.	WHERE REPORTED.	PAGE.
Lanier v. Rex	[1914] A.C. 221, 24 Cox C.C. 53	399, 425
Larocque v. Landry	52 O.L.R. 479.....	46, 47, 57
Larson v. Boyd	46 D.L.R. 126	48
Latham v. R. Johnson & Nephew Ltd. [1913]	1 K.B. 398	36
Laughnan v. Laughnan's Estate.....	162 N.W. Repr. 169.....	558
Lawlor v. Lawlor.....	10 Can. S.C.R. 194	290, 295
Ledyard v. Young	7 O.W.N. 146.....	269
LeFeuvre v. Lankester	3 E. & B. 530, 23 L.J.Q.B. 254, 18 Jur. 894, 2 W.R. 307...	25
Lester v. MacMaster'	28 O.W.N. 307	493
Lewis v. Carr	1 Ex. D. 484	25
Lewis v. Great Western Railway Co.	3 Q.B.D. 195.....	409, 631
Linderme Machine Works Co. v.		
Kuntz Brewery Ltd.	21 O.W.N. 51	512
Linoleum Manufacturing Co. v. Nairn	7 Ch.D. 834	497
Litt v. Cowley	7 Taunt. 169	247
Little v. Hanbury	14 B.C.R. 18	510
Liverpool Household Stores Assn.		
Ltd., In re	59 L.J.Ch. 616.....	421
Liverpool and London and Globe In-		
surance Co. v. Agricultural Sav-		
ings and Loan Co.	33 Can. S.C.R. 94	651, 653
Lloyd v. Robertson	35 O.L.R. 264, 37 O.L.R. 498..	47
Lloyd v. Tweedy	[1898] 1 I.R. 5	151
London Assurance v. Mansel	11 Ch.D. 363	71
London Corporation v. Cox.....	L.R. 2 H.L. 239	354
London County Council v. Allen.....	[1914] 3 K.B. 642	174
London, Mayor of, and Tubbs' Con-		
tract, In re	[1894] 2 Ch. 524.....	409
Long v. Smith	23 O.L.R. 121	558
Long Eaton Recreation Grounds Co.		
Ltd. v. Midland Railway Co....	85 L.T.R. 278	174
Long Point Co. v. Anderson, In re..	18 A.R. 401	363, 649
Loring v. Davis	32 Ch.D. 625	12
Lucas v. De La Cour	1 M. & S. 249	42
Lucy v. Bawden	[1914] 2 K.B. 318	32, 35
Lumley v. Brooks.....	41 Ch.D. 323	312
Lumsden v. Shipcote Land Co.	[1906] 2 K.B. 433.....	312, 317
Lyster v. Kirkpatrick	26 U.C.R. 217	169

M.

Maas v. Gas Light and Coke Co.	[1911] 2 K.B. 543	579
McCaffry v. Canadian Pacific Railway		
Co.	[1924] 2 D.L.R. 213	594
McCarthy v. The King.....	62 Can. S.C.R. 40	409
McConaghy v. Denmark.....	4 Can. S.C.R. 609	61, 268, 269
McEacharn, Re	103 L.T.R. 900	504
McEwen v. Woodstock General Hos-		
pital Trust	Unreported	680
McFall v. Smith	32 Ill. App. 463	48
McGill Chair Co., Re, Munro's Case..	26 O.L.R. 245.....	525
McGregor v. Keiller	9 O.R. 677	61
McGregor v. Norton, Re	13 P.R. 223	354, 357
McGugan v. Smith	21 Can. S.C.R. 263	559
McHattie, Ex p.	10 Ch.D. 398	376
McIntosh v. Parent	55 O.L.R. 552	624
McIntyre v. Stockdale	27 O.L.R. 460.....	261, 264
McIntyre v. Thompson	1 O.L.R. 163	61, 269, 280

NAME OF CASE.	WHERE REPORTED.	PAGE.
Mackay, Ex p.	L.R. 8 Ch. 643	513
McKenna v. Prieur and Hope.....	56 O.L.R. 389	512
McLaren v. Strachan	23 O.R. 120, note.....	61
McLean v. Bruce	13 P.R. 504	258
McLean Gold Mines Ltd. and Attorney-General for Ontario, Re...	54 O.L.R. 573	656, 657
McLean v. McLeod, Re	5 P.R. 467	363
McLeod v. City of Windsor.....	52 O.L.R. 562, [1923] S.C.R. 696, [1923] 3 D.L.R. 559..16, 17, 18, 20, 21, 23	365, 372, 373
McMichael v. Wilkie	18 A.R. 464	365, 372, 373
McMurray v. Northern Railway Co. and Cumberland	22 Gr. 476	551
McNeeley v. McWilliams.....	13 A.R. 324	42
Madill v. McConnell	16 O.L.R. 314, 17 O.L.R. 209...	48
Maddison v. Alderson	8 App. Cas. 467	558
Maguire, Re	51 O.L.R. 63, 2 C.B.R. 94.....	642
Mahmoud v. Ispahani, In re.....	[1921] 2 K.B. 716	309
Maisonneuve v. Township of Roxborough	30 O.R. 127	363
Maloolf v. Bickell	13 O.W.N. 9, 14 O.W.N. 289, 59 Can. S.C.R. 599.....	128
Mangan v. Metropolitan Electric Supply Co.	[1891] 2 Ch. 551	579
Manitoba Grain Futures Taxation Act, Re	[1924] S.C.R. 317, [1924] 3 D. L.R. 203	23
Marriage Legislation in Canada, In re	[1912] A.C. 880	45
Marsh v. Tyrrell	2 Hagg. Ecc. 84	47
Marshall v. Malcolm	87 L.J.K.B. 491	298
Marshall v. Taylor	[1895] 1 Ch. 641	61
Martin, In re	20 Ch.D. 365	580
Martin v. Bannister	4 Q.B.D. 491	87, 88
Martineau v. Kitching	L.R. 7 Q.B. 436	654
Mash v. Darley	[1914] 3 K.B. 1226	390
Mason v. Town of Peterborough...	20 A.R. 683	94, 95
Massey & Carey, In re	26 Ch.D. 459	493
Matthey v. Curling	[1922] 2 A.C. 180	458
Maundrell v. Maundrell	10 Ves. 246	166, 169, 290, 292, 293
Maunsell v. White	4 H.L.C. 1039	558
Measures Brothers Ltd. v. Measures	[1910] 1 Ch. 336, [1910] 2 Ch. 248	598, 601, 602
Mechanic v. General Accident Assurance Co. Ltd.	26 O.W.N. 185	72
Melbourne Tramway and Omnibus Co. v. Tramway Board	[1919] A.C. 667	604
Mercantile Bank of London Ltd. v. Evans	[1899] 2 Q.B. 613	110
Mercantile Investment and General Trust Co. v. International Co. of Mexico	7 Times L.R. 616	549
Mersey Docks and Harbour Board v. Procter	[1923] A.C. 253	36, 38
Mersey Steel and Iron Co. v. Naylor Benzon & Co.	9 App. Cas. 434	452
Mertens v. Home Freeholds Co.....	[1921] 2 K.B. 526	492
Metropolitan Asylum District Managers v. Hill	47 L.T.R. 29	32

NAME OF CASE.	WHERE REPORTED.	PAGE.
Michael v. Hart & Co.	[1902] 1 K.B. 482	453
Millar v. The King	49 O.L.R. 93	311
Mills v. Bowyers Society	3 K. & J. 66	604
Mills v. United Counties Bank Ltd.	[1912] 1 Ch. 231	365
Mimico Pipe and Brick Manufactur- ing Co., Re	26 O.R. 289	482
Misener v. Wabash Railway Co.	12 O.L.R. 71	593
Mitchell v. Cook	25 O.W.N. 25	558
Mitchell v. Thomas	6 Moo. P.C. 137	47, 48
Moffa v. Law Union and Rock In- surance Co.	26 O.W.N. 88	71
Moffatt v. Link	2 O.W.N. 56	87
Montgomery v. Saginaw Lumber Co.	12 O.L.R. 144	305
Montreal, City of, v. Attorney-General for Canada	[1923] A.C. 136	17
Montreal, City of, v. Beauvais.	42 Can. S.C.R. 211	17
Montreal Trust Co. v. The King.	[1924] 1 D.L.R. 1030	110
Montreal Trust Co. v. South Shore Lumber Co.	32 B.C.R. 354	110
Montreuil v. Ontario Asphalt Block Co. Ltd.	48 O.L.R. 18	200, 201
Montrotier Asphalt Co., Re, Perry's Case	34 L.T.R. 716	390
Moody v. Canadian Bank of Com- merce	14 P.R. 258	533, 535
Moody v. King	2 Bing. 447	292
Moore v. Citizens Fire Insurance Co.	14 A.R. 582	71
Moore v. Gamgee	25 Q.B.D. 244	363
Moore v. Metropolitan Life Insurance Co.	54 O.L.R. 474	351
Morgan v. Griffith	L.R. 6 Ex. 70	558, 559
Morris and Chertkoff, Re	56 O.L.R. 665	169
Morris (Herbert) Ltd. v. Saxelby.	[1916] 1 A.C. 688	597, 600
Morris v. Wilson	5 Jur. N.S. 168	43
Morrison v. Chadwick	7 C.B. 266	458
Morrow Cereal Co. v. Ogilvie Flour Mills Co.	57 Can. S.C.R. 403	578
Mouflet v. Washburn	54 L.T.R. 16	363
Moxon, In re	[1916] 2 Ch. 595	321
Murdoch v. West	24 Can. S.C.R. 305	559
Murphy v. Lamphier	31 O.L.R. 287	47
Mutrie v. Alexander	23 O.L.R. 396	677
Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.	41 Times L.R. 183, [1925] A.C. 314	70, 82

N.

Napierville Junction Railway Co. v. Dubois	[1924] S.C.R. 375	594
National Bank of Wales Ltd. In re.	[1899] 2 Ch. 629	392
National Stadium Ltd., Re	55 O.L.R. 199	232
New v. Jones	1 Mac. & G. 668, note	474, 481
Newton, Ex p.	3 DeG. & Sm. 584	471, 476, 483
Newton v. Botsford	43 D.L.R. 330	558, 562
New York and New England Railroad Co. v. City of Waterbury.	55 Conn. 19	405
Noble (John) & Son, Re	5 C.B.R. 147, 27 O.W.N. 107	662, 665

NAME OF CASE.	WHERE REPORTED.	PAGE.
Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. [1894]	A.C. 535	597, 600
North London Railway Co. v. Great Northern Railway Co. 11	Q.B.D. 30	460
Northern Assurance Co. Ltd. v. Farnham United Breweries Ltd. [1912]	2 Ch. 125	551
Northern Electric and Manufacturing Co. Ltd v. Cordova Mines Ltd. 31	O.L.R. 221	365
Northey v. Field 2	Esp. 613	247
Northumberland and Durham, United Counties of, and Town of Coubourg, In re 20	U.C.R. 283	645
North-West Transportation Co. v. Beatty 12	App. Cas. 589	537, 551, 553
Norton v. London and North Western Railway Co. 13	Ch.D. 268	61

O.

Oakes v. Turquand L.R. 2	H.L. 325	228, 232
Oaten v. Stanley 19	Vict. L.R. 553	453
Official Receiver and Liquidator of Jubilee Cotton Mills Ltd. v. Lewis [1924]	A.C. 958	503
Ontario Ladies' College v. Kendry.. 10	O.L.R. 324	230
Ooregum Gold Mining Co. of India v. Roper [1892]	A.C. 124	514, 525
Oram, Ex p. 15	Q.B.D. 399	642
O'Reilly, Ex p. 1	Ves. Jun. 112a	192
Orme v. Wright 3	Jur. 19	267
Orr v. Orr 21	Gr. 397	557, 558, 561
Osborne and Campbell, Re 15	O.W.N. 48	169
Ottawa, City of, v. Hardy..... Unreported		244
Ottawa, City of, v. Keefer 54	O.L.R. 86	243, 244
Ottawa, City of, v. Nantel 51	O.L.R. 269	244
Ottawa, City of, and Township of Nepean, Re 2	O.W.N. 480	645
Overend Gurney & Co., Ex p. L.R. 4	Ch. 460	421
Overend & Gurney Co. v. Gibb..... L.R. 5	H.L. 480	421
Owen Sound Lumber Co., Re..... 34	O.L.R. 528, 38 O.L.R. 415..	421

P.

Page v. Cooper 16	Beav. 396	267
Park, In re 41	Ch.D. 326	311, 313, 316, 318
Parker v. McQuesten 32	U.C.R. 273	421, 436
Parry v. Parry 48	O.L.R. 103	86
Patterson v. Oxford Farmers' Mutual Fire Insurance Co. 7	D.L.R. 369	72
Payne v. Ibbotson 27	L.J. Ex. 341	407
Payne v. Newberry 13	P.R. 392	624, 625
Payzu Ltd. v. Saunders [1919]	2 K.B. 581	489
Pellatt's Case L.R. 2	Ch. 527	528
Phillips and Canadian Order of Chosen Friends, Re 12	O.L.R. 48	234, 239
Phipson v. Kneller 4	Camp. 285	329
Piper v. Stevenson 28	O.L.R. 379	61, 269
Pond v. Sheean 132	Ill. 312	558

NAME OF CASE.	WHERE REPORTED.	PAGE.
Porto Rico, People of, v. Rosaly y Castillo	227 U.S. 270	157
Pratt v. Medical Association	[1919] 1 K.B. 244	224
Prefontaine v. Grenier	[1907] A.C. 101	393, 421, 422
Premier Trust Co. v. Raymond.....	52 O.L.R. 533	503
Price v. Wilkins	58 L.T.R. 680	453
Price v. Rodger	27 O.R. 320	195
Provident Savings Life Assurance Society of New York v. Mowat.	32 Can. S.C.R. 147	71
Pullan v. Jones	3 O.W.N. 361	616

Q.

Qu'Appelle Long Lake and Saskatchewan Railroad and Steamboat Co. v. The King	7 Can. Ex. C.R. 105	195
Quinn v. Leathem	[1901] A.C. 495	277

R.

Rabey v. Gilbert	30 L.J. Ex. 170	326, 329
Rance's Case	L.R. 6 Ch. 104	424
Randall v. Russell	3 Mer. 190	153
Ray v. Pung	5 B. & Ald. 561, 5 Madd. 310	168, 290, 291, 292, 294
Ray v. Willson	24 O.L.R. 122, 45 Can. S.C.R. 401	205, 216, 217
Redington v. Redington.....	3 Ridg. P.C. 106	639
Reed v. St. Paul Fire and Marine Insurance Co.	165 N.Y. App. D'v. 660, 151 N.Y. Supp. 274	71
Regina v. Ellis	[1899] 1 Q.B. 230	409
Regina v. Esdaile	1 F. & F. 213	421
Regina v. Gillespie	2 Can. Crim. Cas. 309	410
Regina v. Hincks	24 L.C. Jurist 116	436
Regina v. Lord Mayor of London.....	69 L.T.R. 721	363
Regina v. Oldham	L.R. 4 Q.B. 290	25
Regina v. Senior	[1899] 1 Q.B. 283	409, 435
Regina v. Sternaman	29 O.R. 35	407
Regina ex rel. Brine v. Booth	3 O.R. 144	25
Regina ex rel. Chambers v. Allison..	1 U.C.L.J.N.S. 244	25
Regina ex rel. Ford v. Cottingham..	1 U.C.L.J.N.S. 214	25
Regina ex rel. Forward v. Bartels....	7 U.C.C.P. 533	25
Reid, Re	50 O.L.R. 595	657, 659, 660
Reid (C. P.) & Co. v. Coleman Bros.	19 O.R. 93	330
Revell, Ex p., In re Tollemache.....	13 Q.B.D. 720	502
Rex v. Bachrack	28 O.L.R. 32	410
Rex v. Baugh	38 O.L.R. 559	446, 449
Rex v. Brinkley	14 O.L.R. 434	398, 415
Rex v. Canadian Allis-Chalmers Ltd.	54 O.L.R. 38	405
Rex v. Chancellor of University of Cambridge	1 Str. 557	355
Rex v. Cheshire County Court Judge.	[1921] 2 K.B. 694.....	86, 87, 91
Rex v. Clark	3 O.L.R. 176	390
Rex v. Crippen	[1911] 1 K.B. 149	448
Rex v. De Bruze	55 O.L.R. 507	393, 438
Rex v. Dominion Cartridge Co. Ltd..	[1923] Ex. C.R. 93.....	110
Rex v. Dumont	49 O.L.R. 222	390, 405
Rex v. Epstein	56 O.L.R. 587	438, 440

NAME OF CASE.	WHERE REPORTED.	PAGE.
Rex v. Governor of Pentonville Prison	67 J.P. 206	334, 337
Rex v. Gray	[1925] 1 W.W.R. 831	335
Rex v. Hadijah Ahmed Caroubi....	7 Cr. App. R. 149	449
Rex v. Hendrie	11 O.L.R. 202	405
Rex v. Hill	7 Cr. App. R. 1	446, 448
Rex v. Howarth	13 Cr. App. R. 99	448
Rex v. Keating	2 Cr. App. R. 61	449
Rex v. Lee Kun	[1916] 1 K.B. 337	354, 359
Rex v. Lewis	14 Cr. App. R. 33	437
Rex v. Lomas	23 Cox C.C. 765	405
Rex v. Lovitt	[1912] A.C. 212	17, 21
Rex v. Lovitt	13 Can. Crim. Cas. 15	392
Rex v. Lovitt	41 N.S.R. 240	421, 436
Rex v. Marks Feigenbaum	[1919] 1 K.B. 431	390
Rex v. Munton	6 East 590 (citation)	409
Rex v. Nat Bell Liquors Ltd.	[1922] A.C. 128 65 D.L.R. 1....	250
Rex v. Nerlich	34 O.L.R. 298	390
Rex v. Oliphant	[1905] 2 K.B. 67, 21 Cox C.C. 192	407, 409, 410
Rex v. Parker and Bulteel	25 Cox C.C. 146	408
Rex v. Ping Yuen	65 D.L.R. 722	398, 415
Rex v. Ratcliffe	14 Cr. App. R. 95	448
Rex v. Robinson	14 O.L.R. 519	334, 335, 336
Rex v. Starkie	16 Cr. App. R. 61	446, 449
Rex v. Swityk	43 Can. Crim. Cas. 245	450
Rex v. Taylor	12 Can. Crim. Cas. 244....	334, 335
Rex v. Totty	10 Cr. App. R. 78	450
Rex v. Wallis	5 T.R. 375	342
Rex v. Warner	1 Cr. App. R. 227	449
Rex v. Wilson	9 Cr. App. R. 124	450
Rex v. Woodfall	5 Burr. 2661	415
Rhode Island Locomotive Works v. South Eastern Railway Co.	31 L.C. Jur. 86	508
Rice v. Sockett	27 O.L.R. 410	48, 58
Richer, Re	46 O.L.R. 367	154
Ridley v. Ridley	34 Beav. 478	559
Ritter v. Godfrey	[1920] 2 K.B. 47	580
River Stave Co. v. Sill	12 O.R. 557	511
River Wear Commissioners v. Adam- son	2 App. Cas. 743	157, 631
Roberts v. Hall	1 O.R. 388	559
Robinson v. Marsh	[1921] 2 K.B. 640	154
Robinson v. Mollett	L.R. 7 H.L. 802	128
Robinson v. Morris	19 O.L.R. 633	335
Robinson v. Osborne	27 O.L.R. 248, 8 D.L.R. 1014, 1021	60, 61, 63
Rockmaker v. Motor Union Insurance Co. Ltd.	52 O.L.R. 553	72
Roddy v. Fitzgerald	6 H.L.C. 823	136
Roe v. Township of Wellesley....	43 O.L.R. 214	325
Rogers and McFarland, Re	19 O.L.R. 622	647
Rogers v. Mississippi and Dominion Steamship Co.	14 Q.L.R. 99	508
Rogers v. Nixon	Unreported	270
Rogerson v. Campbell	10 O.L.R. 748	148
Romford Canal Co., In re.....	24 Ch.D. 85	503
Rooke's Case	5 Co.R. 996	282
Rosenzweig, In re	1 C.B.R. 431	508, 513

NAME OF CASE.	WHERE REPORTED.	PAGE.
Ross, Re	1 O.W.N. 867	148
Ross v. Scottish Union and National Insurance Co.	58 Can. S.C.R. 169	71
Rowan v. Toronto Railway Co.	29 Can. S.C.R. 717	32
Roxburghe v. Cox	17 Ch.D. 520	110
Royal Aquarium and Summer and Winter Garden Society v. Parkinson	[1892] 1 Q.B. 431	657
Royal British Bank v. Turquand....	7 E. & B. 327	503
Rubberset Co. v. Boeckh Brothers Co. Ltd.	46 O.L.R. 11	497
Ruffy-Arnell and Baumann Aviation Co. v. The King	[1922] 1 K.B. 599....179, 187, 188	
Russell v. Amalgamated Society of Carpenters and Joiners	[1916] 1 K.B. 506	587
Russell v. Macdonald	12 P.R. 458	258
Russell v. Russell.....	[1924] A.C. 687	297, 299
Russell v. Watts	25 Ch.D. 559	176
Rutzen v. Farr	4 A. & E. 53	48

S.

Sabapathy v. Vanmahalinga	[1915] 1 L.R. 38 Mad. 959....	453
St. John's College Cambridge v. Pierrepont	61 L.J.Q.B. 19	90
Sampson v. Burton	4 Moo. R. 515	104
Sampson v. Robertson	[1925] 1 D.L.R. 624	325
Samson, In the Goods of	3 P. & D. 48	678
Sanderson v. Burdett	16 Gr. 119, 18 Gr. 417....	43, 261, 264, 538
Sandiman v. Breach	7 B. & C. 96	342
Sanitary Commissioners of Gibraltar v. Orfila	15 App. Cas. 400	460
Savill Bros. Ltd. v. Bethell.....	[1902] 2 Ch. 523	169
Scamen v. Canadian Northern Railway Co., In re	6 D.L.R. 142....	48, 98, 100, 104
Scarf v. Jardine	7 App. Cas. 345	329, 330, 332
Scott, Re	57 O.L.R. 381	532
Scott v. Hydro-Electric Commission of City of Hamilton	7 O.W.N. 385	460
Scottish Petroleum Co., In re.....	23 Ch.D. 413	228, 230, 232
Seale v. Barter	2 B. & P. 485	139
Seaman v. West	17 N.S.R. 207	654
Seddon v. Smith	36 L.T.R. 168	60, 61, 63
Sercombe v. Township of Vaughan..	45 O.L.R. 142	324
Seton-Smith, In re	[1902] 1 Ch. 717	106
Sewell v. British Columbia Towing Co.	9 Can. S.C.R. 527	32
Sharland, In re	[1899] 2 Ch. 536	161
Sharon and Stuart, Re	12 O.L.R. 605	131, 143
Shaw v. Arden	9 Bing. 287	493
Shaw v. Board of Education of St. Thomas	2 O.W.N. 1467, 19 O.W.R. 846..	36
Shaw v. Royce Ltd.	[1911] 1 Ch. 138	550
Shearer v. Hogg	46 Can. S.C.R. 492	151, 383
Sheffield v. Sheffield	L.R. 10 Ch. 206	579
Shepherd v. Harrison	L.R. 5 H.L. 116	13, 14
Shepherdson v. McCullough	46 U.C.R. 573	61
Sherras v. De Rutzen	[1895] 1 Q.B. 918	390

NAME OF CASE.	WHERE REPORTED.	PAGE.
Sherren v. Pearson	14 Can. S.C.R. 581	61, 268, 269, 270
Sherwood v. Cline	17 O.R. 30	357
Siddall v. Gibson	17 U.C.R. 98	363, 649
Sidebottom v. Kerslaw Lees and Co. Ltd.	[1920] 1 Ch. 154	551
Simpson v. Crowle	[1921] 3 K.B. 243.....	91
Simpson v. Local Board of Health of Belleville	41 O.L.R. 320	467
Sievert, Re	51 O.L.R. 305, 67 D.L.R.	199 279, 283
Skinner, In re	[1904] 1 Ch. 289	505
Skinner v. Stocks	4 B. & Ald. 437	42
Small v. Thompson	28 Can. S.C.R. 219	365, 373
Smethurst v. Tomlin.....	2 Sw. & Tr. 143	678
Smith v. Prosser	[1907] 2 K.B. 735	216
Smith v. Smith	29 O.R. 309	558
Smith's Estate, In re	[1894] 1 I.R. 60	476
Sneath v. Valley Gold Ltd.	[1893] 1 Ch. 477	551
Solicitor, Re	47 O.L.R. 522, 48 O.L.R.	363 .. 311
Solicitor, Re	12 O.W.R. 1074	165
Solicitors, Re	27 O.L.R. 147	164, 165
Somers, In re	4 Mans. 227	642
Soules v. Little, Re	12 P.R. 533	354
South Africa Breweries Ltd. v. King.	[1900] 1 Ch. 273	510
Southcote v. Stanley	1 H. & N. 247, 108 R.R.	549.... 36
Spellman and Litovitz, Re	44 O.L.R. 30	338, 339
Squires Bros., In re	3 C. B. R. 191	664
Stahl v. Stevenson	102 Kans. 447	558
Stavert v. Lovitt	42 N.S.R. 449	421, 436
Steers v. Shaw	1 O.R. 26	61
Stewart v. Rounds	7 A.R. 515	32
Stewart v. Stewart	56 O.L.R. 57	44, 45
Stickland v. Aldridge	9 Ves. 516	559
Stiles v. Ecclestone	[1903] 1 K.B. 544.....	85, 87, 91
Stocks (Joseph) & Co. Ltd., In re..	[1912] 2 Ch. 134, note	551
Stone v. City and County Bank ...	3 C.P.D. 282	230, 232
Storer & Co. v. Johnson	15 App. Cas. 203	310, 311, 318
Story v. Dunlop	13 Gr. 375	505
Strauss and Fierstein, Re	26 O.W.N. 304	169
Stringer and Riley Bros., In re ...	[1901] 1 K.B. 105	604
Strong v. Crown Fire Insurance Co..	29 O.L.R. 33	71
Stroughill v. Anstey	1 DeG. M. & G. 635	267
Sturges v. Countess of Warwick ...	30 Times L.R. 112	259
Sutton v. Dineen, Re	23 O.W.N. 115	649
Sweetapple v. Bindon	2 Vern. 536	152
Swift & Co. v. Board of Trade ...	[1925] A.C. 520	604
Synge v. Synge	[1894] 1 Q.B. 466	559

T.

Tancred v. Delagoa Bay and East Africa Railway Co.	23 Q.B.D. 239	110
Taylor v. Caldwell	3 B. & S. 826	493
Taylor v. Yeandle	27 O.L.R. 531	677
Tea Corporation Ltd., In re	[1904] 1 Ch. 12	551
Thomas v. The Queen	L.R. 10 Q.B. 31	196
Thomas, In re, Vivian v. Vivian ...	[1920] 1 Ch. 515	137
Thompson v. Parish	5 C.B.N.S. 685	533, 536

NAME OF CASE.	WHERE REPORTED.	PAGE.
Thompson v. Wilkes	5 Gr. 594	371
Thomson's Estate, In re	14 Ch.D. 263	151
Thornton v. Place	1 Moo. & R. 218	486
Throckmorton v. Crowley	L.R. 3 Eq. 196	533, 535
Tobin v. The Queen	14 C.B.N.S. 505	194
Toronto City Corporation v. Toronto Railway Corporation	[1925] A.C. 177	603
Toronto Dairy Co. v. Gowans	26 Gr. 290	602
Toronto Hockey Club v. Arena Gar- dens of Toronto Ltd.	55 O.L.R. 509	609
Toronto Railway Co. v. City of To- ronto	[1920] A.C. 426	620
Treasurer of Ontario v. Canada Life Assurance Co.	33 O.L.R. 433	17
Trimble v. Hill	5 App. Cas. 342	334, 337, 505
Trinity College v. Levinter	54 O.L.R. 290	260
Trusts and Guarantee Co. v. Dodds ..	27 O.W.N. 294	260
Tuck, In re	10 O.L.R. 309	151
Turner v. Prevost	17 Can. S.C.R. 283	558
Turquand v. Marshall	L.R. 4 Ch. 376	421
Tyrrell v. Painton	[1894] P. 151	47

U.

Union Fish Co., In re	3 C.B.R. 779, 24 O.W.N. 23....	664
Universal Non-Tariff Fire Insurance Co., In re	L.R. 19 Eq. 485	72

V.

Versailles Sweets Ltd. v. Attorney- General of Canada	[1924] S.C.R. 466	110
Victorian Daylesford Syndicate Ltd. v. Dott	[1905] 2 Ch. 624	309

W.

Wakefield v. Wakefield	2 O.L.R. 33	145, 152
Walker, Re	56 O.L.R. 517	383, 530, 532
Walker v. Boughner	18 O.R. 448	558
Walker v. Dickson	20 A.R. 96	372
Walker v. Elmore's German and Aus- tro-Hungarian Metal Co. Ltd.	85 L. T. R. 767	551
Walker v. Midland Railway Co.	2 Times L.R. 450	36, 37
Wallace v. Long	105 Ind. 522	558
Waring v. Ward	7 Ves. 332	365, 370, 372, 373
Warren, Re	52 O.L.R. 127	147
Warren Gzowski & Co. v. Forst & Co.	24 O.L.R. 282, 46 Can. S.C.R. 642	328
Washington, Re	23 O. R. 299	223, 227
Waters v. Monarch Life Assurance Co.	5 E. & B. 870	654
Watson v. Rodwell	3 Ch.D. 380	579
Watson Bros. v. Jones	125 La. 249	104
Watteau v. Fenwick	[1893] 1 Q.B. 346	43
Watts v. Bucknall	[1902] 2 Ch. 628 [1903] 1 Ch. 766	421
Watts v. Christie	11 Beav. 546	254

NAME OF CASE.	WHERE REPORTED.	PAGE.
Webb v. Commissioners of Herne Bay.	L.R. 5 Q.B. 642	504
Weigell and Co. v. Runciman and Co.	115 L.T.R. 61	12
West v. Williams	[1899] 1 Ch. 132	110
Western Assurance Co. v. Harrison.	33 Can. S. C. R. 473	71
Weston v. Downes	1 Doug. 23	490
Whistler v. Forster	14 C.B.N.S. 248	208
White, Re	22 O.W.N. 266	147
Whitehead v. Gibbons.	10 N.J. Eq. 230	157
Whitehall v. Ettlinger	[1920] 1 K.B. 680	457
Whiteman v. Hawkins	4 C.P.D. 13	493
Whiteley v. Pepper	46 L.J.Q.B. 436	36
Wild's Case	6 Rep. 166. . . 130, 131, 138, 139,	142
Williams, In re	4 O.L.R. 501	482
Williams v. Frith	1 Doug. 198	315
Wilmott v. Barber	15 Ch.D. 96	175
Wilson v. Esquimalt and Nanaimo Railway Co.	[1922] 1 A.C. 202	657
Wilson v. Irwin	10 P.R. 598	580
Wilson v. Mitchell	101 Penn St. 495	47
Wilson v. Rastall	4 T.R. 753	282
Wilson v. Riddell	20 O.W.N. 24	460
Wilson v. Wilson	22 Gr. 39, 24 Gr. 377	47
Wilton v. Colvin	3 Drew. 617	157
Wing v. Angrave	8 H.L.C. 183	234
Wingrove v. Wingrove	8 O.W.N. 21	558
Winnipeg Electric Railway Co. v. City of Winnipeg	30 D.L.R. 159	656
Wise v. Canadian Bank of Commerce.	52 O.L.R. 342	680
Wolfenden v. Wilson	33 U.C.R. 442	490
Wood v. Duke of Argyll	6 Man. & G. 928	330
Wood v. Haines	38 O.L.R. 583	578
Wood v. Prestwich	104 L.T.R. 388	453
Woods v. Dean	32 L.J.Q.B. 1	329
Worrall v. Harford	8 Ves. 4	474
Worsley v. Earl of Scarborough.	3 Atk. 302	263
Worthington v. Robbins and Cadigan.	56 O.L.R. 285	287, 288
Wragg Ltd., In re	[1897] 1 Ch. 796	528
Wray, In re	36 Ch.D. 138	580
Wright v. Chard	4 Drew. 673	365
Wright v. Doe d. Tatham	7 A. & E. 313	48
Wright v. Fonda and Higgins	44 Mo. App. 634	330
Wright v. Olmstead	3 O.W.N. 434	61
Wright v. Tatham	5 Cl. & F. 670	59, 103
Wyllie v. Pollen	32 L.J.N.S. Ch. 782	330

Y.

Yager and Guardian Assurance Co., Re	108 L.T.R. 38	71
Yorkshire Banking Co. v. Beatson.	5 C.P.D. 109	32
Young and Harston's Contract, In re.	31 Ch.D. 168	409
Young v. Naval Military and Civil Service Co-operative Society of South Africa	[1905] 1 K.B. 687	483
Young v. Smith	21 D.L.R. 97	230
Young v. Tibbitts	32 Wis. 79	330
Young v. Town of Gravenhurst.	22 O.L.R. 291, 24 O.L.R.	467, 459, 460, 470



REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

NORTHERN GRAIN CO. LTD. v. GODERICH ELEVATOR AND TRANSIT
Co. LTD.

1925.

March 13.

Bailment—Warehouseman—Storage of Grain Shipped to Warehouse by Lake-vessel—Instructions from Shippers to Ship Grain by Rail to Purchasers—Delivery to one Purchaser without Production of Lake-bills of Lading—Failure of Purchaser to Pay for Grain—Action against Warehouseman to Recover Damages for Loss—Absence of Request or Direction from Shipper—Omission of Warehouseman to Instruct Railway Company—Whether Duty Owed to Shipper.

The plaintiff, a grain merchant in Manitoba, shipped by a lake-vessel 70,000 bushels of grain to the defendant, an elevator company in Ontario, for storage, and advised the defendant that the grain would be shipped out by rail from the elevator to various purchasers from the plaintiff. The P. company, one of these purchasers, obtained 15,000 bushels of the grain without production of the lake-bills of lading covering the 15,000 bushels; and, the P. company failing to pay a large part of the purchase-price, the plaintiff sued the defendant to recover the amount of its loss, alleging that there was a term in the contract of bailment imposing on the defendant an obligation not to deliver the goods without production of the lake-bills. The default alleged was that the defendant did not instruct the district freight agent of the railway company to whom the rail-bills were sent not to hand them to the P. company till that company produced the lake-bills for endorsement thereon of the quantity shipped:—

Held (HODGINS, J.A., dissenting), that the defendant was under no obligation, express or implied, in the absence of a request or direction from the plaintiff, to act as it was contended it should have acted, and there was no such request or direction.

It was the custom of the defendant, for its own protection, to direct the district freight agent to hold rail-bills sent him till the lake-bills were produced and the endorsement made; but the defendant's instructions to the agent in this case did not contain this direction; and the defendant's neglect to protect itself gave no right of action to the plaintiff—the defendant being under no obligation to the plaintiff to do the thing it neglected to do.

AN appeal by the defendant company from the judgment of RIDDELL, J., at the trial, in favour of the plaintiff company for the recovery from the defendant company of damages for wrongfully delivering out of its elevator to the Peerless Cereal Mills Ltd.

App. Div. 15,000 bushels of the plaintiff company's oats without production
 1925. of the lake-bills of lading.

NORTHERN
 GRAIN CO.
 LTD.
 v.
 GODERICH
 ELEVATOR
 AND
 TRANSIT
 CO. LTD.

November 28 and December 8, 1924. The appeal was heard
 by MULLOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH,
 J.J.A.

F. H. Phippen, K.C., for the appellant company, argued that it incurred no liability to the plaintiff company by delivering the grain to the Peerless Cereal Mills Ltd. according to the plaintiff company's instructions without production of the lake-bills. The plaintiff company had sent unqualified instructions to accept the orders of the Peerless company, with no information that there were any drafts to be paid, or that rail-bills were not to be delivered to the consignee until lake-bills were produced. Counsel also contended that the appellant company was not required to instruct the district freight agent to whom it sent the rail-bills not to hand them to the consignee till it produced the lake-bills for endorsement of the quantity thereon. The appellant company's custom so to instruct freight agents was only for its own protection, and its failure to do so gave the plaintiff company no right of action against it. Counsel also contended that the appellant company did not know that it was shipping the grain to a purchaser from the plaintiff.

A. W. Anglin, K.C., and *G. R. Munnoch*, for the plaintiff company, respondent, contended that the basis of the dealings between the plaintiff and the defendant and the extent of their respective rights and obligations were established by correspondence between the parties, which shewed the usual practice in connection with shipments from the head of the lakes to a lower lake elevator intended for subsequent rail-shipment, and evidenced the plaintiff's right to have this usual practice followed, and the obligation of the defendant to follow it. This usual practice required the lower lake elevator to deal with the rail-bills so that "all concerned are adequately protected," and involved dealing with the rail-bills so that control of the rail-shipments would not pass to a purchaser without delivery of or "endorsement from" the outstanding lake-bills. These letters also displaced the contention (which was the foundation of the defendant's case) that the defendant was concerned with the lake-bills only for its own protection, and not for the protection of the plaintiff, as well as the second contention of the defendant, that it did not know it was shipping the oats to a purchaser from the plaintiff. The correspondence between the defendant's manager and the railway agent, immediately after the loss, shewed that the defendant's manager then thought the rail-bills had been sent to the railway agent for delivery to the purchaser "in exchange for

lake-bills or reduction therefrom in the usual way," and that the defendant's manager was surprised to learn of the defendant's neglect in this connection. The defendant, contrary to the usual practice which it had contracted with the plaintiff to observe, caused the purchaser to be named in the rail-bills as the shipper, the consignee, and the party to be notified, and sent the rail-bills to the railway-agent at Woodstock without instructions, thereby putting the oats in the unconditional control of the purchaser. The orders given by the plaintiff to the defendant, on which the defendant now sought to rely, must be read in the light of the whole situation, including the common understanding of all concerned as to the practice in connection with such shipments, the knowledge of the defendant that the oats were being shipped to a purchaser from the plaintiff, and the contractual obligations of the defendant created by the preliminary correspondence above referred to. So read, they would not justify what the defendant did. Indeed, even the defendant's manager, immediately after the event, assumed that the defendant could not have done what in fact it had done.

App. Div.

1925.

NORTHERN
GRAIN CO.

LTD.

v.

GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

March 13, 1925. MULOCK, C.J.O.:—The plaintiff carries on, in the city of Winnipeg and elsewhere, the business of buying and selling grain, and the defendant carries on, in the town of Goderich, in the Province of Ontario, the business of warehousing grain. This action was brought to recover from the defendant the price of 15,000 bushels of oats, portion of a shipment amounting in all to 70,000 bushels, shipped from Fort William to Goderich by the plaintiff to the defendant and taken into its warehouse at Goderich, and, when there, sold by the plaintiff to the Peerless Cereal Mills Limited at Woodstock and shipped by the defendant by rail to that company. The Peerless company obtained possession of the oats in question, and, after payment for 5,000 bushels only, became insolvent, and the action is brought to recover the unpaid balance, namely, \$7,963.11.

The plaintiff charges that the defendant, negligently and in breach of its duty to the plaintiff, shipped the grain to the Peerless company under circumstances which enabled that company to obtain possession without payment. The learned trial Judge found in favour of the plaintiff, and the appeal is from his judgment.

The question to be determined depends upon the effect to be given to the following correspondence between the parties:—

"Winnipeg, Manitoba, May 4th, 1923.

"Goderich Elevator & Transit Company, Goderich, Ont.

"Gentlemen:—We are pleased to advise you that some time during this month, probably the latter half, we will have shipped

App. Div.
1925.

NORTHERN
GRAIN CO.
LTD.
v.
GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Mulock,
C.J.O.

in your care 70,000 bushels No. 2 feed oats which will be for domestic distribution. We will be wanting to order this loaded out on track from time to time as our orders call for and will appreciate hearing from you just what the procedure is in this connection so that we can handle ourselves satisfactorily with you and to give you the least trouble in the matter.

"The above is our first shipment in your care, and, when we get ourselves in line with what has to be done to facilitate the handling at your end, we will be guided accordingly and enabled to expedite the movement through your hands.

"Appreciating your early advices and favours, we are,

"Yours very truly,

"The Northern Grain Co. Ltd.

"P.S. We will give you advices of forwarding as soon as the same is loaded at Fort William."

To this letter the defendant sent the following answer:—

"Goderich, Ont., May 7/23.

"Northern Grain Co., Winnipeg.

"Dear Sirs:—We have your favour of the 4th and note that you contemplate shipping some No. 2 feed oats in our care this month, for domestic distribution.

"This will have our extreme care on arrival and in storing and shipping.

"The usual method is to write or wire in your orders with complete information, backed up by shipping bills in triplicate over the road on which shipment is desired. The lake-bills may be held by your bank or any Eastern shipper to whom the rail-bills can be sent for endorsement from and attachment to draft on the purchaser. The usual method, however, is for us to send these rail-bills to the nearest division freight agent of the railway, in your territory; but we may say it is immaterial whether they go to the bank or the D.F.A., so long as all concerned are adequately protected. When the bills have been completed by shipment of the aggregate amount covered thereby, they are sent in to us for filing.

"Insurance on grain stored is taken care of by the shipper, and also the cancellations as shipments are made.

"We are enclosing herewith one of our tariffs, which will give handling, storage, and insurance rate, with general conditions covering the operation of our plant. We also enclose a mileage tariff which will prove convenient for your billing.

"We shall be glad to serve you at any time, and we quite

believe that a test shipment will serve to shew you that we have exceptional facilities for handling domestic shipments via the Canadian National or Canadian Pacific Railways.

"Yours faithfully,

"Goderich Elevator & Transit Co. Ltd."

The tariff enclosed in the above mentioned letter is headed "Rules and Regulations Governing the Company's Elevators," and contains the following rules:—

"9. Upon payment of all freight charges being made and in exchange for lake-bills of lading properly endorsed, the company will issue warehouse receipts for grain received and weighed in to the company's elevators. No transfer of such receipts will be recognised by the company, nor will the grain so designated be delivered until the original warehouse receipt has been duly endorsed by the owners of the grain and surrendered to the company or its authorised agent.

"10. Elevation, storage, or other handling charges accruing to the company, must be paid before securing delivery of the grain to the consignee.

.....

"12. Owners or their agents when sending instructions for shipment of grain from the elevators must state name of vessel, with date of lake-bill of lading, from which shipment is desired."

The following is the answer of the plaintiff to the above mentioned letter of the 7th May:—

"May 11th, 1923.

"Goderich Elevator & Transit Co., Goderich, Ont.

"Gentlemen:—We beg to acknowledge receipt of your favour of the 7th and appreciate the information you have so carefully conveyed to us in the same. This we have made careful note of and will govern ourselves accordingly.

"We wish to thank you for the tariffs enclosed. The same will be made good use of by us.

"As soon as our loadings go forward, which we expect will be some time the latter half of this month, we will give you additional advices."

On the 25th May, 1923, the plaintiff wrote the defendant as follows:—

"May 25th, 1923.

"Goderich Elevator & Transit Co., Goderich, Ont.

"Gentlemen:— (Attention Mr. Parsons.)

"Billed on the S.S. Martian, ex Fort William, May 21st, to

App. Div.

1925.

NORTHERN
GRAIN CO.
LTD.

v.
GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Mulock,
C.J.O.

App. Div.

1925.

NORTHERN
GRAIN CO.

LTD.

v.

GODERICH

ELEVATOR

AND

TRANSIT

CO. LTD.

Mulock,

C.J.O.

Goderich, in care of your good selves, loaded for our account, 45,572 bushels 22 lbs. of No. 2 feeds in hold No. 2. You will kindly give this shipment your careful attention, advising us of its unload. This information is in line with our advices of the 4th and your favour dated the 7th. Further shipments will be going forward in your care of both wheat and oats, and instructions will be given to you from time to time. These shipments will be all for domestic use and reloaded for our customers in Ontario. Our customers in the East will be giving you instructions as to the loadings, which we will confirm at the same time to you."

To this letter the defendant sent the following answer:—

"Goderich, Ont., May 29/23.

"Northern Grain Co., Winnipeg, Man.

"Dear Sirs:—Reference your favour of the 25th.

The Martian unloaded here on May 24th, and the outturned quantity of your No. 2 feed oats was 45,572-22 bus., the vessel shortage of 115-20 bus. having been charged against your lot. The shortage value thereof you will of course collect from the outturn insurers.

"In making sales to any Eastern or other purchasers, it will be most advantageous to all concerned if you will 'night-letter' us promptly, advising what quantity has been sold and to whom. We will then be able to accept their telegraphic orders for shipment as sales may necessitate. If perchance you are making car-shipments to individual purchasers, you will please advise to whose order you wish the grain shipped, naming the party to advise, and advising where we shall send rail-bills for endorsement from the lake documents.

"Trusting we may be able to serve your valued interests satisfactorily, we are

"Yours faithfully."

On the 1st June 1923, the plaintiff wrote the defendant as follows:—

"June 1st, 1923.

"Goderich Elevator & Transit Co., Goderich, Ont.

"Gentlemen:—We have your favour of the 29th advising us of the shortage as outturned on the shipment of No. 2 feeds *ex* S.S. Martian. Please accept our thanks for these advices. We have to-day filed statement of claim with the insurance people for their further attention.

"We note your additional advices in connection with the procedure to facilitate the loading and shipping, *ex* the elevator, and

this we will keep in front of us for our further guidance and attention.

“Yours very truly,

“The Northern Grain Co. Ltd.”

In this latter quoted letter the plaintiff indicates that “in connection with the procedure to facilitate the loading and shipping *ex* the elevator” the plaintiff will advise the defendant (a) to whose order the grain is to be shipped, (b) the party to advise, and (c) where to “send the rail-bills for endorsation from the documents.” The plaintiff did not exchange the lake shipping bills of lading for warehouse receipts from the defendant, but had them divided into separate shipping bills, each for 5,000 bushels, retaining the custody of them. Thus, so far as the defendant was aware, the plaintiff was the absolute owner of the oats when in warehouse. Such was the situation when the plaintiff gave to the defendant shipping instructions in respect of the oats in question.

On the 20th June, the plaintiff telegraphed the defendant as follows: “Please accept orders of Peerless Cereal Mills ten thousand bushels No. 2 feed oats *ex* Martian May 24th; and sent the following confirmatory night-letter:—

“Winnipeg, Man., June 20th, 1923.

“We wish to confirm our wire to you to-day, authorising you to accept loading instructions from the Peerless Cereal Mills, at Woodstock, on 10,000 bushels No. 2 feed oats, *ex* S.S. Martian unloaded May 24.”

On the 23rd June the plaintiff telegraphed the defendant as follows: “Winnipeg, Man., June 25/23. Please accept orders of Peerless Cereal Mills 10,000 bushels No. 2 feed oats *ex* Martian;” and sent the following confirmatory night-letter:—

“We are pleased to confirm advices to you this morning instructing you to accept orders from the Peerless Cereal Mills at Woodstock covering 10,000 bushels No. 2 feed oats *ex* Martian.

“Thanking you for your prompt attention to this request, yours truly,

“The Northern Grain Co. Ltd.”

Acting upon the instructions contained in these telegrams and night-letters, the defendant shipped by rail to the Peerless Cereal Company at Woodstock the 20,000 bushels of oats, sending to that company also the railway bills of lading. Thus the Peerless company was enabled to obtain possession of the oats, but, after payment for 5,000 bushels, became insolvent, and the balance remains

App. Div.

1925.

NORTHERN
GRAIN CO.
LTD.

v.
GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Mulock,
C.J.O.

App. Div.

1925.

NORTHERN
GRAIN CO.
LTD.

v.

GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.Mulock,
C.J.O.

unpaid. The plaintiff contends that the defendant was guilty of a breach of duty in sending the railway bills to the Peerless company, whereby it was enabled to obtain possession of the oats, that it should have forwarded these bills to the railway agent with instructions not to permit the Peerless company to obtain possession of the oats until after payment therefor, and that by reason of such failure of duty the defendant is liable to the plaintiff for the loss in question.

In my opinion, the case turns upon the meaning which, under all the circumstances, the defendant was entitled to place upon the two telegrams and confirmatory night-letters. By them, in unqualified language, the defendant is instructed to "accept orders" in respect of the oats from the Peerless Cereal Mills Company. That company is thus given dominion over the oats. To "accept orders" does not necessarily imply that the oats are to be shipped by rail. For example, if the Peerless company had demanded delivery of the oats *ex* warehouse at Goderich, it would, I think, have been the duty of the defendant to comply with the demand. In such case there would have been no shipment by rail, and, therefore, no rail-bills. The plaintiff, by letter of the 1st June, undertook that in connection with the loading and shipping it would be guided by the directions of the defendant, as set forth in the letter of the 29th May, one of which was to inform the defendant where to send the rail-bills for endorsement from lake documents. This the plaintiff omitted to do. When, therefore, the defendant received unqualified instructions from the plaintiff (who, so far as the defendant knew, was the sole owner of the oats) to accept orders from the Peerless company, the plaintiff giving no instructions in respect of rail-bills, the defendant was entitled to assume that it was to give to the Peerless company absolute control over the oats, which would include delivering to the company rail-bills. If the defendant had disobeyed these instructions, and loss had thereby been occasioned to the plaintiff, it would, I think, have been answerable in damages. It is to be observed that the defendant, in the letter of the 7th May to the plaintiff, explaining the usual method of transacting business, states that "complete information" is to be given to the elevator company. It therefore follows that the plaintiff, if desiring any meaning to be given to the telegrams and night-letters other than that implied by their ordinary reading, should have given to the defendant "complete information for its guidance." Under these circumstances, the defendant was, I think, entitled to assume that the telegrams and night-letters gave "complete information" and were to be interpreted by the defendant according to their own language alone, and not from any circumstance *dehors* them.

For these reasons, I think, with respect, that the judgment of the learned trial Judge should be set aside, and that this action should be dismissed with costs here and below.

SMITH, J.A. (after setting out the facts):—Treating the lake-bills as warehouse receipts from the appellant to the respondent for the oats received, the former was bailee for hire of the goods for the respondent on the terms of the tariff, and would incur no liability on these documents to the respondent if it saw fit to deliver the goods according to the respondent's instructions without production of the warehouse receipts, represented in this case by the lake-bills. It is the right of the bailee to require for his own protection delivery up of the warehouse receipt; but, if he neglects to do so, the bailor, who gets the goods delivered in compliance with his own directions, has no cause of complaint. It is, however, contended that in this case there was a term in the contract of bailment between the parties imposing on the bailee, the appellant, an obligation for the protection of the respondent not to deliver up the goods in any case, even in compliance with the express terms of the instructions given by the respondent, without production of lake-bills covering the quantity of the shipments. If there is such a term, it is to be gathered from the letters and the rules and regulations quoted above. There is nothing in clauses 9, 10, and 12 of these rules, to my mind, having any such effect. They amount to nothing more than an intimation that the appellant will insist on rights which the law gives without any such rules. It surely could not be contended that merely because a copy of these rules was sent to the respondent it would have a right of action against the appellant if the latter by some negligence delivered the grain to the respondent without getting the lake-bill, or without getting payment of the storage and landing charges, or without the information referred to in clause 12. Delivery to a third party in compliance with the respondent's direction could not, so far as clause 9 is concerned, have any different effect from delivery to the respondent. The rules and regulations are for the protection of the appellant, and in themselves create, I think, no obligation on the appellant to enforce them for the benefit or protection of the respondent, and it follows that such obligation, if it exists, arises from what is to be found in the letters quoted. There is nothing in this correspondence creating such an obligation in express terms, but the argument is that, taking the correspondence, the rules and regulations, and what was done as a whole, such an obligation should be inferred. It appears to me that the inquiry as to procedure in the respondent's letter of the 4th May had reference to

App. Div.

1925.

NORTHERN
GRAIN CO.
LTD.

v.

GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.Mulock,
C.J.O.

App. Div.
1925.

NORTHERN
GRAIN CO.
LTD.
v.
GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Smith, J.A.

the procedure by the appellant for release, as delivery was made, of its liability on the negotiable documents of title to the goods outstanding. The respondent, experienced in shipping goods by rail, surely required no information as to how to protect itself on a shipment by rail of its goods. The reply of the 7th May goes no farther. It leaves it to the respondent to provide as it wishes for its own protection, and points out how the appellant protects itself by directing that lake-bills may be sent to the bank or any Eastern shipper to whom the rail-bills can be sent for "endorsement from and attachment to the draft"—that is, if the respondent is sending a draft on the purchaser with lake-bill attached to the bank or some one else, it is to give the information or direction, and the appellant will send the rail-bills there to have the shipment endorsed from the lake-bill. Then there is the statement that the usual method is to send the rail-bills to the nearest division freight agent. The reason is evident, though not expressly stated, namely, that by instructing the division freight agent not to hand over the rail-bill till the lake-bill is produced and the amount of the shipment endorsed on it, the appellant is protected against further liability for that quantity. There is no indication, in my opinion, of any intention that this was an undertaking by the appellant to deal in this way with the rail-bills for the respondent's benefit or protection, further than to indicate how it could comply with its obligation to produce the lake-bill, in effect a warehouse receipt, before getting delivery. The letter of the 11th May does not carry the matter farther. The respondent was to "write or wire complete information." In this case it was drawing through the bank with lake-bill attached and had the means of protection in its own hands by following the ordinary course of directing the appellant to ship to the order of the bank holding the draft, or to send the rail-bills to the bank or to some one else with direction not to deliver the same to the consignee till the lake-bill was produced. Instead, the respondent sent unqualified directions to accept the Peerless Cereal Mills Company's orders, with no information that there were any drafts to be paid or that rail-bills were not to be delivered to the consignee till lake-bills were produced. In fact, the first of these instructions stated that the lake-bills were being forwarded to the Peerless company, and, so far as the appellant knew, the goods might have been already paid for or sold on credit. The appellant, on these instructions, consigned the oats to the Peerless company, and it is not contended that this should not have been done, though according to the strict reading of the telegrams and letters the appellant should have waited for orders

from the Peerless company. No argument, however, was based on the lack of instructions from that company. The default relied on is that the appellant did not instruct the district freight agent to whom it sent the rail-bills not to hand them to the consignee till it produced the lake-bills for endorsement of the quantity on the same.

For the reasons stated, I think that the appellant was under no obligation to the respondent to do so, in the absence of a request or direction from the respondent, and there was none. What was said or written after the event can have no bearing. It was the custom of the appellant, for its own protection, to direct the district freight agent to hold rail-bills sent him till the lake-bills were produced and the endorsement made, and its officers at first asserted that this had been done, and claimed that the railway company was liable for delivering without this being done. It turned out that the letter of instructions to the district freight agent did not contain this direction, but the appellant's neglect to protect itself gives no right of action to the respondent where, according to my conclusion, the appellant was under no obligation to the respondent to do the thing it neglected to do.

I think the appeal should be allowed with costs and the action dismissed with costs.

MAGEE, J.A.:—I agree with my brother Smith in his reasons and conclusion that this appeal should be allowed.

The lake-bills of lading, after the voyage had been completed and the grain delivered to their holder, the plaintiff, by its transshipment into the defendant's elevator, were effete and were no longer indicia of title and might have been destroyed as waste paper.

By agreement between the plaintiff and defendant, or even without consent of the defendant, they could indeed still be used by the plaintiff as convenient pieces of paper on which to give orders for delivery of so much grain as they originally represented, by mere endorsement, and such endorsement, under such agreement or without it, would justify the defendant in complying with such an order. But the agreement would not override the right of the plaintiff, the owner of the grain, to demand or to direct delivery of the warehoused grain to itself or any one else without mentioning production of the old and useless bills of lading. Indeed the plaintiff itself would probably be the first to resent any attempt on the part of the defendant to require production of the ship's bills, with which the defendant was in no way connected, as a condition precedent to shipment from the elevator.

App. Div.

1925.

NORTHERN
GRAIN CO.
LTD.

v.

GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Smith, J.A.

App. Div.
 1925.
 ———
 NORTHERN
 GRAIN CO.
 LTD.
 v.
 GODERICH
 ELEVATOR
 AND
 TRANSIT
 CO. LTD.
 ———
 Magee, J.A.

Having the right so to direct delivery or shipment, and having done so, making no reference to the lake-bills, it cannot, in my view, complain that its express instructions were complied with without the defendant taking precautions which it was not advised of any necessity for and not instructed to take. In making the shipment by rail, the defendant was acting not as a warehouseman but as agent of the plaintiff, and I do not find any instructions or course of business which required the defendant to make sure that any one else had the order or implied order of the plaintiff to receive the grain other than the order to ship which the defendant itself had received.

FERGUSON, J.A., agreed with SMITH, J.A.

HODGINS, J.A.:—Appeal by the defendant from the judgment of Riddell, J. The view of the learned trial Judge is expressed in these words:—

“I think the letters of the defendants themselves, and in the expression ‘letters’ I include the printed statement, shew that their duty was not to have the oats delivered up to any person without the protection and delivery over of the lake-bill of lading. . . .

“I think, however, that it was the clear duty of these defendants to notify the railway company to whom they delivered the oats that they were not to be delivered over even to a consignee without the production and the delivery over to them of the lake-bill of lading or its delivery *pro tanto*.”

If the correspondence relating to the two shipments of oats by rail in question here were dealt with, apart from what preceded and followed it, the defendant might well seek to apply the doctrine exemplified in *Ireland v. Livingston* (1872), L.R. 5 H.L. 395; *Loring v. Davis* (1886), 32 Ch. D. 625; and *Weigell and Co. v. Runciman and Co.* (1916), 115 L.T.R. 61.

The respondent is a grain merchant in Winnipeg, who shipped by S.S. “Martian” 70,000 bushels of oats to the defendant at Goderich for storage, the plaintiff advising it that it would ship them out by rail to various purchasers from it. The Peerless Cereal Company Ltd., one of these purchasers, obtained 15,000 bushels without production of the lake-bills covering them.

The transactions out of which the loss in this case occurred are the shipments of the 20th and 23rd June. Instructions as to these, by telegram and letter, were given as follows:—

“Please accept orders of Peerless Cereal Mills ten thousand bushels No. 2 feed oats *ex* Martian May 24th” (telegram).

"Winnipeg, Man., June 20th, 1923. We wish to confirm our wire to you to-day authorising you to accept loading instructions from the Peerless Cereal Mills, at Woodstock, on 10,000 bushels No. 2 feed oats, *ex* S.S. Martian, unloaded May 24th" (letter of the 20th June, 1923).

It will be observed that there is no reference to lake or other documents in either of them. On the 23rd June, similar instructions to those of the 20th June were given by wire and letter, except that the word "loading" does not appear—otherwise the instructions were identical.

Now, there had been two transactions previous to the 20th June, those of the 31st May and the 11th June, but on the letters relating to them, "lake-bills," in the one case, and "documents covering" the amount of oats dealt with, were stated to be in the possession of the purchasers.

All these four transactions followed the defendant's letter to the plaintiff dated the 29th May, which was as follows:—

"In making sales to any Eastern or other purchasers, it will be most advantageous to all concerned if you will 'night-letter' us promptly, advising what quantity has been sold and to whom. We will then be able to accept their telegraphic orders for shipment as sales may necessitate. If perchance you are making car-shipments to individual purchasers, you will please advise to whose order you wish the grain shipped, naming the party to advise, and advising where we shall send rail-bills for endorsement from the lake documents."

The plaintiff received this letter and says that it had noted the defendant's additional advice in connection with the procedure to facilitate the loading and shipping *ex* the elevator, "and this we will keep in front of us for our further guidance and attention."

In the orders relating to the two shipments in question here, there is no compliance with the definite request from the defendant to be told "where we shall send rail-bills for endorsement from the lake documents." It might then be very well said that the plaintiff itself had misled the defendant into thinking that "orders" meant any directions that might be given, and that, in the absence of specific mention regarding the lake documents, it was incumbent on them to act on the very wide terms of the order, irrespective of the position and custody of the lake-bills.

But I think the defendant itself has supplied the answer to this argument. The lake-bills of lading put in have the effect described by Lord Westbury in *Shepherd v. Harrison* (1871), L.R. 5 H.L.

App. Div.

1925.

NORTHERN
GRAIN CO.
LTD.

v.

GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Hodgins,
J.A.

App. Div.
1925.

NORTHERN
GRAIN CO.
LTD.
v.
GODERICH
ELEVATOR
AND
TRANSIT
CO. LTD.

Hodgins,
J.A.

116, at pp. 128, 129, where he says that "they," meaning the shippers, "controlled the possession of the captain, and made the captain accountable to deliver the cotton to the holder of the bill of lading. The bill of lading was the symbol of property, and by taking the bill of lading they kept to themselves the right of dealing with the property shipped on board the vessel. They also kept to themselves the right of demanding possession from the captain. They had, therefore, all the incidents of property vested in themselves." These words are as applicable to the defendant's possession as to that of the captain, and the effect and significance of these lake-bills were well known to the defendant.

The defendant had been asked at the outset what was its usual method of dealing with this sort of transaction, and had replied:—

"The usual method is to write or wire in your orders with complete information, backed up by shipping bills in triplicate over the road on which shipment is desired. The lake-bills may be held by your bank or any Eastern shipper to whom the rail-bills can be sent for endorsement from and attachment to draft on the purchaser. The usual method, however, is for us to send these rail-bills to the nearest division freight agent of the railway, in your territory; but we may say it is immaterial whether they go to the bank or the D.F.A., so long as all concerned are adequately protected. When the bills have been completed by shipment of the aggregate amount covered thereby, they are sent in to us for filing. . . ."

The latter sentences are important. The defendant was among those concerned, for, where no warehouse receipt was issued, these lake-bills, when endorsed from or given up, constituted its discharge from liability to the owner to deliver to him. While the defendant might waive this, so far as its interest went, it had indicated its "usual method" which, as it said, protected all concerned: one not contrary to loading orders or indeed to any other order which a purchaser might be expected to give. It was a course of dealing, there can be no doubt, well-understood among shippers and elevator-men, even though it was not proved to have reached the status of custom or invariable practice. The defendant was fully alive to all this, and, as mentioned, pressed again for advice as to the whereabouts of these documents on the 29th May. I can see nothing in the telegrams and letters of the 20th and 23rd June, if the state of mind of the defendant, evidenced by its letters, is borne in mind, to cause or authorise it, without notice to the plaintiff, to forgo its "usual method" so as to protect all concerned, or to alter the necessity of requiring the lake-bills to be produced before delivery. It might well be deduced from its earlier letter

that, in the absence, in advance of rail-shipment, of the information it had asked for, it would adopt the course which gained the same end, while dispensing with that information.

That this state of mind existed and continued throughout these transactions is proved by the attitude of the defendant's manager when he learned of the non-payment of the drafts for this grain. He at once asserted as against the railway company: "Notwithstanding we had billed certain shipments to Woodstock to 'order' of Peerless Cereal Co., for No. 2 feed oats *ex* Martian, and sent the rail-bills to you for delivery to Peerless Cereal Co., in exchange for lake-bills, or reduction therefrom, in the usual way, that you have delivered the oats to the Peerless people without cancellation of the lake-documents."

In addition to this, it may be observed that the defendant's manager was not called to shew that he was in any way misled by the instructions which he had received.

In the face of these facts, it is impossible to think that what happened was other than an inadvertence in not sending the usual instructions with the rail-bills, and not a fault due to ambiguous instructions.

On these grounds I agree with the judgment appealed from and would dismiss the appeal with costs.

Appeal allowed (HODGINS, J.A., dissenting.)

[APPELLATE DIVISION.]

RE MCLEOD AND CITY OF WINDSOR.

1925.

Constitutional Law—Provincial Taxation—Whether Indirect—British North America Act, sec. 92(2)—Assessment of Trustee in Respect of Income of Estate—Tax to be Paid by Trustee, but Ultimately to be Borne by Beneficiaries—Assessment Act, secs. 2(ka), 13(3) and (4), Added by 12 & 13 Geo. V. ch. 78, secs. 2, 12—Income of one Year Assessable in Following Year.

March 13.

In October, 1923, the appellant, as trustee, was assessed by the city corporation in respect of the income of an estate, which, by the will of a testator, he was directed to receive and accumulate until 1933, and then to distribute among persons not ascertainable until the date fixed for distribution:—

Held, that, the assessment being made in 1923 for taxes payable in 1924, the validity of the assessment should be determined by reference to the statute in force at the date of the assessment.

By an Act passed in 1922, 12 & 13 Geo. V. ch. 78, sec. 2 of the Assessment Act, R.S.O. 1914, ch. 195, was amended by adding clause (ka) and sec. 13 by adding subsecs. 3 and 4.

All the income sought to be assessed was in the hands of the appellant in Ontario; but it was contended that because part of the income

App. Div.

1925.

NORTHERN
GRAIN Co.
LTD.

v.
GODERICH
ELEVATOR
AND
TRANSIT
Co. LTD.

Hodgins,
J.A.

1925.

RE MCLEOD
AND
CITY OF
WINDSOR.

came into his hands in Michigan, as income derived from a part of the estate situated in Michigan, and was subsequently transferred to his bank-account in Ontario, the Michigan income was not assessable under the wording of sec. 13 as amended:—

Held, that the intention of the Legislature, as expressed in sec. 13 as amended, was that the trustee should be taxable in respect of such income as he had in his possession in Ontario, irrespective of the source of the income.

Held, however, that the effect of the imposition (by sec. 13 as amended) of taxes in respect of income in the hands of a trustee in possession or control thereof for the benefit of others is to make him pay taxes which he is not intended to bear, but to obtain from other persons; and, consequently, the tax sought to be imposed upon and collected from the appellant was an indirect tax, the imposition of which was beyond the powers of the Provincial Legislature: *British North America Act*, sec. 92(2).

Review of the authorities.

Any property actually in Ontario is subject to direct taxation by the Province, but the Act, as it stands, does not impose a direct tax upon income in possession of a trustee, but rather a tax upon the trustee. The judgment of Orde, J., in *McLeod v. City of Windsor* (1922), 52 O.L.R. 562, affirmed by the Supreme Court of Canada, [1923] S.C.R. 696, does not conclusively determine the question of *ultra vires* raised in this case.

Although the assessment in 1923 was in respect of income received in 1922 (sec. 11(2) of the Assessment Act), yet such income was assessable in 1923.

APPEAL by James B. McLeod, surviving trustee of the estate of John Curry, from an order of COUGHLIN, Co.C.J. of Essex, affirming a decision of the Court of Revision for the City of Windsor whereby the assessment of the appellant in respect of income which, by the will of John Curry, the appellant was directed to receive and accumulate until 1933, and then to distribute among persons not ascertainable until the date fixed for distribution, was confirmed.

The appeal was upon a case stated by the County Court Judge.

December 10 and 11, 1924. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

A. C. McMaster, K.C., and J. H. Rodd, K.C., for the appellant, pointed out that the Supreme Court of Canada had decided in the case of *McLeod v. City of Windsor*, [1923] S.C.R. 696, that McLeod was not assessable under the Assessment Act as it stood before the amendments made in 1922 by 12 & 13 Geo. V. ch. 78, secs. 2 and 12; and argued that the amendment created no difference in this regard, and the case cited still governed, referring to *Re Gibson and City of Hamilton* (1919), 45 O.L.R. 458; *Re Gamble and Robinson and City of Sault Ste. Marie* (1923), 54 O.L.R. 93. Because part of the income in McLeod's hands came into his possession in the State of Michigan, as income derived from the

Michigan estate, and was afterwards transferred to McLeod's bank-account in Windsor, the Michigan estate was not assessable under the provisions of sec. 13 as amended by sec. 12 of the Act of 1922. The tax imposed by the assessment of McLeod was an indirect tax, because he was being assessed for the income of another, and the imposition was consequently *ultra vires* of the Ontario Legislature: *Cotton v. The King*, [1914] A.C. 176; *Burland v. The King*, [1922] 1 A.C. 215; *Re Town of Cochrane and Cowan* (1921), 50 O.L.R. 169; *City of Montreal v. Attorney-General for Canada*, [1923] A.C. 136; *Attorney-General for Quebec v. Reed* (1884), 10 App. Cas. 141. McLeod had been assessed for 1922, when he was not assessable, and the municipal council did not assess him anew for 1923, but merely adopted the assessment for 1922, which was invalid, and the assessment for 1923 was also invalid.

F. D. Davis, K.C., for the Municipal Corporation of the City of Windsor, contended that the question of indirect taxation did not arise, because sec. 92, head 2, of the British North America Act applied only to the raising of revenue for provincial purposes: *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348; *City of Montreal v. Beauvais* (1909), 42 Can. S.C.R. 211; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Treasurer of Ontario v. Canada Life Assurance Co.* (1915), 33 O.L.R. 433. The Assessment Act directs an assessment of the income, and imposes a liability on the trustee to pay out of the income only, and limits the trustee's personal liability to funds of the estate in his hands: *Rex v. Lovitt*, [1912] A.C. 212; *Re Doe* (1914), 16 D.L.R. 740.

Edward Bayly, K.C., for the Attorney-General for Ontario, argued that the intention of the Legislature as expressed in the Act was that the tax was to be both demanded from the trustee and ultimately paid and borne by him personally. It was a direct tax, and *intra vires* of the Province.

March 13. The judgment of the Court was read by FERGUSON, J.A.:—The assessment was made in October, 1923, for taxes payable in 1924. In prior proceedings between the same parties, in reference to an assessment of McLeod by the city corporation in respect of the income received in 1920, it was determined that the Assessment Act, as it then stood, did not provide for the assessment of McLeod in respect of income received and to be retained by him for unknown or unascertained persons: *McLeod v. City of Windsor*, [1923] S.C.R. 696, [1923] 3 D.L.R. 559.

Concurrently with his appeals under the Assessment Act in reference to the assessment made in 1920, McLeod prosecuted an

App. Div.
1925.

RE McLEOD
AND
CITY OF
WINDSOR.

App. Div.
1925.

RE McLEOD
AND
CITY OF
WINDSOR.

Ferguson,
J.A.

action against the Corporation of the City of Windsor in which he sought to have it declared that secs. 5 and 13 of the Assessment Act imposed an indirect tax, and were consequently *ultra vires* of the Provincial Legislature. That action was tried before Mr. Justice Orde and dismissed: see *McLeod v. City of Windsor* (1922), 52 O.L.R. 562.

McLeod appealed to the Supreme Court of Canada (a) from the judgment of this Court in the assessment proceedings and (b) from the judgment of Orde, J. The Supreme Court of Canada allowed the assessment appeal, but dismissed the appeal in the action. Having in the assessment appeal arrived at the conclusion that McLeod was not assessable because his case was not covered by secs. 5 and 13 of the Act as it then stood, the Court was of opinion that it was not necessary to determine the constitutional validity of these sections, and also that, not being affected by these sections of the Act, McLeod had not the status necessary to entitle him to maintain the action to determine their validity.

The assessment here in question being made in 1923 for taxes payable in 1924, it seems to follow that the validity of the assessment and the right to collect thereon should be determined by reference to the statute in force at the date of the assessment. By an Act passed in 1922, 12 & 13 Geo. V. ch. 78, the Assessment Act, R.S.O. 1914, ch. 195, was amended as of the 1st January, 1923: see sec. 30.

By sec. 2 of the amending Act, 12 & 13 Geo. V. ch. 78, sec. 2 of the Assessment Act is amended by adding clause *ka*, as follows:—

“(ka) ‘ Person ’ shall include any partnership, any body corporate or politic and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law.”

By sec. 12 of the amending Act, 1922, it was enacted that sec. 13 of the Assessment Act should be amended by adding thereto the following subsections:—

“(3) Notwithstanding anything contained in this section or any other section of this Act, every agent, administrator, trustee, executor or person who collects or receives or is in any way in possession or control of income for or on behalf of an estate and which income is not wholly distributed annually shall be assessed, in respect of the income not so distributed, on behalf of the estate in the municipality wherein the testator was domiciled at the time of his death.

“(4) Income which has been assessed against any agent, administrator, trustee, executor or other person on behalf of an estate

under the foregoing subsection 3 shall not be again assessed, when received by the beneficiary or person entitled thereto."

The appeal comes to us on a case stated pursuant to sec. 81 of the Assessment Act; and, after stating the facts as agreed upon by the parties, the learned Judge asks the opinion of the Court on the following questions:—

1. Whether the income received by the said trustee from the Ontario estate is assessable for income under the Assessment Act.

2. Whether the income received by the said trustee from the estate of the said deceased in Michigan is assessable for income under the said Act.

3. Whether the income received by the said trustee, so far as the same is payable or may be payable to Gladys Alma Curry, is assessable under the said Act.

4. If so, is not the Assessment Act *ultra vires* of the Provincial Legislature by reason of its imposing indirect taxation?

5. Whether the assessment of the income received by the said trustee, during the accumulation period mentioned in the deceased's will, for Verene May McLeod, or for any grandchildren entitled thereto, is indirect taxation and is *ultra vires* of the Provincial Legislature.

6. Whether the accumulated income of this estate, being made divisible among unascertained persons, falls within the definition of "income" under the Assessment Act, and as such assessable under the provisions of the Assessment Act.

7. Whether or not, under the circumstances set forth in para. 9, James B. McLeod, sole surviving trustee of the said estate, is not estopped by the said judgment of Mr. Justice Orde from maintaining the claims made by him herein.

All the income sought to be assessed is admittedly in the hands of McLeod and in his custody in the Province of Ontario, and it was not contended that the Province could not authorise an assessment of property actually within the Province, and direct the payment of the taxes from that property, but it was contended that because part of the income in McLeod's hands came into his possession in the State of Michigan, as income derived from the Michigan estate, and was subsequently transferred to McLeod's bank-account in Windsor, the Michigan income was not assessable under the wording of sec. 13 as amended.

In my opinion, the intention and purpose of the Legislature, as expressed in these sections, is that the trustee shall be taxable in respect to such moneys as he has in his possession in Ontario, irrespective of the source of the income, and that the main question

App. Div.

1925.

RE MCLEOD
AND
CITY OF
WINDSOR.

Ferguson,
J.A.

App. Div.
1925.
RE McLEOD
AND
CITY OF
WINDSOR.
Ferguson,
J.A.

on this appeal is: Is the tax imposed by the assessment of McLeod a direct or indirect tax? If it is an indirect tax, it becomes unnecessary to determine the other questions asked by the learned Judge appealed from.

That the Supreme Court of Canada and this Court were both of opinion that under the Act prior to amendment in 1922 the person assessed was personally liable for the payment of the taxes is, I think, clearly indicated by the following pronouncement of Anglin, J., agreed in by, I think, all the Court, in *McLeod v. City of Windsor*, [1923] S.C.R. 696, at p. 709:—

“Assessment is the only basis of municipal taxation under the Ontario system. As put by Sir William Mulock, C.J.Ex., in *In re Gibson and Hamilton*, ‘there can be no taxation of income without previous assessment of some person in respect of such income.’ A person assessed in respect of income is thereby made personally liable to pay a tax upon it at a rate imposed according to other provisions of the law.”

Before us counsel for the Attorney-General did not contend that the Act as amended did not impose a personal liability on the trustee to pay the tax or limit his liability to payment out of the funds in his hands, but argued that, according to the true intent and meaning of the legislation, the tax was to be both demanded from the trustee and ultimately paid and borne by him personally.

On the other hand, counsel for the city corporation contended that, according to its true intent and meaning, the Act directed an assessment of the income and imposed a liability on the trustee to pay out of the income only, and limited the trustee's personal liability to such funds of the estate as he had available to pay the tax. The intention of the Legislature, as expressed in sec. 5, is to make all property as such liable to assessment and to collect taxes in respect thereof; but, as pointed out in the *Gibson* case and in the prior *McLeod* case, the Act provides no machinery or procedure for the assessment of income other than by the assessment of some person in respect thereof; and, except in the case of certain lands, provides no machinery for the collection of a tax from a source other than the person assessed. I have only been able to find two exceptions to the general scheme of assessment and collection, and they are found in reference to assessments of land. See secs. 37, 39, and 94. The scheme of the Act for the assessment of land is to make both the land and the person assessed liable to pay the tax (sec. 94) except in the assessment of (1) lands held in trust, in which case it is, by subsec. 12 of sec. 37, provided that the trustee's liability to pay the taxes shall be limited to the trust funds

he has in hand; (2) Crown lands occupied by some one other than the Crown, in which case it is, by sec. 39, provided that the person assessed and his interest in the lands, rather than the lands of the Crown, shall be liable for the tax.

Subsection 3 of sec. 13 (added in 1922) and sec. 95 do not place a limitation on the liability of the trustee assessed in respect of income such as is by subsec. 12 of sec. 37 placed upon the liability of a trustee assessed in respect of lands—and, after the decisions in the *Gibson* case and the prior *McLeod* case, I am of opinion that it is not now open to this Court to hold that the Act does not impose a personal liability upon McLeod to pay the taxes, irrespective of whether he has or has not in his hands funds available for payment of taxes. It seems to follow that the answer to the question, Is the tax imposed upon McLeod a direct tax or an indirect tax? turns on the intention and purpose of the legislation as to who shall ultimately pay and bear the tax.

It is, by *Cotton v. The King*, [1914] A.C. 176, and *Burland v. The King*, [1922] 1 A.C. 215, well-established that if the intention and purpose of the legislation was and is that the trustee from whom the tax is demanded shall collect it from some one else, then the tax is indirect. On the other hand, it seems, by *Rex v. Lovitt*, [1912] A.C. 212, to be equally well-established that if the intent and purpose of the Legislature was and is that the trustee assessed in respect of income received for his *cestui que trust* shall not pass it on to or collect it from the persons beneficially entitled to the income, but shall himself both pay and bear the tax, the tax is a direct tax.

A direct tax is defined in the *Cotton* case, the *Lambe* case, and the *Burland* case as one which is “demanded from the very person who it is intended or desired should pay it,” and an indirect tax is one which is “demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.”

In the former case of *McLeod v. City of Windsor*, [1923] S.C.R. 696, Mr. Justice Duff discussed what are direct and what are indirect taxes, also the factors that should be considered and kept in mind in arriving at a conclusion as to the intention of the legislation as to who should bear the tax. At p. 704 he said:—

“The meaning and effect of the words ‘direct taxation’ as they appear in item No. 2 of sec. 92 of the British North America Act have been considered in many cases, and as Lord Moulton says in *Cotton v. The King*, [1914] A.C. 176, at p. 193, it ‘is no longer open to discussion’ that the meaning to be attributed to that

App. Div.

1925.

RE McLEOD
AND
CITY OF
WINDSOR.

Ferguson,
J.A.

App. Div.
1925.

RE McLEOD
AND
CITY OF
WINDSOR.

Ferguson,
J.A.

phrase is substantially the definition quoted from the treatise of John Stuart Mill in these words: 'A direct tax is one which is demanded from the very persons who it is intended or desired should pay it.'"

And at p. 706 Duff, J., said:—

"Where personal liability is imposed upon a trustee or agent in respect of income received by him as such and the tax is not charged upon the income and there is no recourse against it by the taxing authority and the trustee is under no duty to the taxing authority to retain the income in his hands and apply it in payment of the tax, we should appear to have a case in which the trustee is the very person from whom the taxing authority demands the tax, it being left to him to secure his indemnity from those who are ultimately intended to sustain the burden.

"The case is, of course, quite different where no personal liability is imposed, where, for example, the liability of the trustee or agent is limited to the amount in his hands for his beneficiary; as in the case of *Burland v. The King*, [1922] 1 A.C. 215."

It seems clear to me that the amended Act provides for the assessment of the trustee, and also imposes a personal liability on the trustee to pay, and that the tax is not charged upon the income, and that the Act does not impose upon the trustee any duty to apply the income to the payment of the tax, and that the liability of the trustee is not limited to the funds in his hands for his beneficiary, all of which, however, may be consistent with an intention that the trustee should not only pay but should himself bear the tax—but such an interpretation would, I think, be inconsistent with subsec. 4 of sec. 13, which provides that the income assessed under subsec. 3 shall not be again assessed in the hands of the beneficiary. Subsection 4 seems to me to be based upon the hypothesis that the beneficiary has been charged by the assessment of his trustee and to indicate expressly that the intention of the Legislature was and is that the trustee paying taxes in respect of income received for his beneficiary shall pass the tax on to the beneficiary—and to my mind it would be unreasonable to suppose that the Legislature intended the trustee rather than the person beneficially entitled to the income to pay and bear the tax. I am of the opinion that the whole structure of the scheme for the imposition of taxes on income, or in respect of income, in the hands of persons in possession or control thereof for the benefit of others, depends on a system designed to make the trustee pay taxes which he is not intended to bear, but to obtain from other persons, and that consequently the tax sought to be imposed upon

and collected from McLeod is an indirect tax, *ultra vires* of the Province, and illegal: *Re Manitoba Grain Futures Taxation Act*, [1924] S.C.R. 317, [1924] 3 D.L.R. 203.

App. Div.
1925.

RE McLEOD
AND
CITY OF
WINDSOR.

Ferguson,
J.A.

The conclusion I have arrived at as to the tax being an indirect one is sufficient to dispose of the appeal in favour of the appellant, and it is perhaps unnecessary to discuss and answer the other questions submitted by the learned County Court Judge; but, as the case may go farther, I think it advisable to say that I am of opinion:—

(1) That any property actually in Ontario is subject to direct taxation by the Province, but that the Act as drawn does not impose a direct tax upon the income in possession of trustees, but rather a tax upon the trustee fixed by reference to the amount of the income, with the intention that the trustee shall indemnify himself by charging the tax to his beneficiaries.

(2) That the judgment of Mr. Justice Orde in *McLeod v. City of Windsor*, 52 O.L.R. 562, does not conclusively determine the question of *ultra vires* or *intra vires* raised in this proceeding, because (a) the statute considered by Mr. Justice Orde has been since amended, (b) the Supreme Court of Canada, in dismissing the appeal from the judgment pronounced by Mr. Justice Orde, expressly refrained from pronouncing upon the question, being of the opinion that in the action then before the Court the appellant McLeod had no status to question the constitutional validity of the legislation.

(3) That, although the assessment in 1923 is in respect of income received in 1922 (see sec. 11, subsec. 2), yet such income was assessable in 1923.

The appellant is entitled to costs here and below, payable by the Corporation of the City of Windsor.

Appeal allowed.

[IN CHAMBERS.]

REX EX REL. SCROGGIE V. ROBB.

1925.

March 14.

Municipal Corporations—Election of Person as Township Councillor—Disqualification—Membership in Rural Public School Board—Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, sec. 53(1) (j).

A disqualifying clause in a statute must be strictly construed and according to its very words.

Reference to authorities upon the construction of statutes disqualifying persons holding certain offices from becoming members of municipal councils.

1925.

REX EX REL.
SCROGGIE
v.
ROBB.

Section 53(1) (j) of the Consolidated Municipal Act, 1922, providing that "a member of a public or separate school board or of a board of education of a city, town or village, or a member of a high school board," shall not be eligible to be elected a member of a municipal council or be entitled to sit or vote therein, applies to the case of a member of a public school board of a rural school section elected as a councillor of the township of which the rural school section forms part.

The words "of a public or separate school board" are applicable to *every* public or separate school board—not merely to boards of a city, town, or village.

APPEAL by George B. Robb from an order of GAULD, Jun. Co. C.J. of the County of Wentworth, declaring void the election of the appellant as a councillor of the Township of Beverly for 1925, upon the ground that he was, on the 29th December, 1924, on which day he was nominated as a councillor and declared elected by acclamation, a member of the public school board of school section No. 5 of the same township, and therefore disqualified by sec. 53 (1) (j) of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72.

March 13. The appeal was heard by RIDDELL, J., in Chambers.

J. W. Lawrason, for the appellant.

C. W. R. Bowlby, for Joseph Scroggie, the relator.

March 14. RIDDELL, J.:—George B. Robb was on the 29th December, 1924, a member of the public school board of school section No. 5 of the township of Beverly; on that day he was nominated as a councillor for the same township for the year 1925, and declared elected by acclamation. Joseph Scroggie moved to have it declared that Robb was not duly elected, being disqualified by the Consolidated Municipal Act, 1922, sec. 53 (1) (j), which is in these words and figures:—

"53.—(1) The following shall not be eligible to be elected a member of a council or be entitled to sit or vote therein: . . . (j) A member of a public or separate school board or of a board of education of a city, town or village, or a member of a high school board"

His Honour Judge Gauld gave effect to the contention of the relator, and, in an admirably clear and concise judgment, gave his reasons for the conclusion arrived at.

It would suffice to say that I wholly agree in this conclusion, but counsel desire that I give a written judgment; and in view of the public importance of the matter, I accede to the request.

In approaching the consideration of the appeal, I am wholly in accord with what was said long ago in certain of our *quo warranto* cases as well as in the English Courts.

In *Regina v. Oldham* (1869), L.R. 4 Q.B. 290, the defendant was attacked because it was said that he was the regular minister of a dissenting congregation, and consequently disqualified from being a town councillor of Wallingford—5 & 6 Wm. IV. ch. 76, sec. 28 (Imp.)

Riddell, J.
1925.
REX EX REL.
SCROGGIE
v.
ROBB.

In *Lewis v. Carr* (1876), 1 Ex. D. 484, one who had had an interest in a contract with the council was attacked as an alderman under the same section. Cleasby, B., felt (p. 491) "in this penal clause of the statute . . . bound to give a somewhat strict interpretation to the language."

Coleridge, J., giving the judgment of the Court, in *LeFevre v. Lankester* (1854), 3 E. & B. 530, 23 L.J.Q.B. 254, 18 Jur. 894, 2 W.R. 307, at p. 544 of the first named report, speaking of a contention that the alleged act was within the mischief of the statute, says: "Even if the case be brought within the mischief, it is not within the words of the enactment: and we must not strain a penal enactment so as to bring cases within it."

Armour, J., in *Regina ex rel. Brine v. Booth* (1883), 3 O.R. 144, at p. 147, discussing the provision of R.S.O. 1877, ch. 174, sec. 74, that "No shop-keeper licensed to sell spirituous liquors by retail shall be qualified to be a member of the council of any municipal corporation," says, "This being a disqualifying clause must be construed strictly and according to its very words."

Much the same thing is said concerning the right of franchise in *Regina ex rel. Ford v. Cottingham* (1865), 1 U.C.L.J.N.S. 214, by Morrison, J.; in *Regina ex rel. Forward v. Bartels* (1858), 7 U.C.C.P. 533, by Richards, J.; and in *Regina ex rel. Chambers v. Allison* (1865), 1 U.C.L.J.N.S. 244, by John Wilson, J.

In my view, the right of being chosen to represent his fellows in a representative body, Parliament, Legislature, municipal council, is one of the dearest possessions of a freeman, and it should not be taken away without clear statutory direction.

With all inclination to assist the appellant, I cannot find a loophole for him.

The legislation before 1922 need not be considered—admittedly, unless the change made in 1922 be helpful, the appellant's case is hopeless. It is unnecessary then to consider the earlier cases.

Upon the existing legislation, the question here is: "Is a member of every public or separate school board disqualified as a

Riddell, J. member of a public or separate school board in a city, town, or village?"
1925.

REX EX REL.
SCROGGIE

v.
ROBB.

To obtain the correct answer to this question, it is, I think, necessary only to consider the state of the case.

In our educational system the first step is the public school (or its correlative the separate school), in which is given primary education; then follows the high school (or collegiate institute) for secondary education; and then the summit—the University. Each of these is in the charge of a board of trustees under one name or another. Before 1903, the board in charge of the primary schools was always a board of public school trustees (or of separate school trustees).

But the Act of 1903, 3 Edw. VII. ch. 31, created a "board of education" in lieu of the "board of public school trustees" and the "board of high school trustees" and the "board of management of technical schools" in cities of not less than 100,000 population. In 1904, the statute 4 Edw. VII. ch. 33 allowed any city of less population, and any town or village, to have a "board of education" if so desired.

There are then, excluding the University: (1) boards of public (or its correlative the separate school), in which is given primary education; (2) high school boards, concerned with secondary education; and in some cities, towns, and villages (3) boards of education, concerned with both.

It seems to me that the Legislature meant to exclude all members of boards of trustees concerned with primary or secondary education, and used apt language for the purpose.

A consideration of the language from a grammatical and logical point of view leads to the same result—the second "of" must be given effect to, and the clause "of a board of education of a city, town, or village" is the regimen of "a member" understood. One who performs the functions of a public school or high school trustee does not become qualified because the board of which he is a member is called a board of education.

No other interpretation is reasonable.

I find no support in grammar, logic, law, or history for the contention of the appellant.

The appeal is dismissed with costs.

[ROSE, J.]

1925.

March 18.

RE HOME BANK OF CANADA.

NATIONAL TRUST CO.'S CASE.

Banks and Banking—Winding-up—Contributories—Double Liability of Shareholders—Trust Company Holding Shares as Trustee—Bank Act, 1923, 13 & 14 Geo. V. ch. 32, sec. 53(a)—Relief from Personal Liability—Copy of Probate of Will Creating Trust Lodged with Bank—Entries in Books of Bank—Will “Named” in Books “in Connection with such Holding”—Shares Held in Representative Capacity—Reservation of Claim against Executor for Failure to Retain Assets of Estate Sufficient to Answer Possible Liability.

By the will of O, of which the trust company was executor, 50 shares of the capital stock of the bank were bequeathed to the trust company in trust to hold the same and during the lifetime of the testator's daughter to collect the dividends and accretions and pay them to her, and after her death to transfer the shares to such charitable institution as she should by will appoint, etc. After the will had (in 1908) been admitted to probate, the trust company lodged a copy with the bank, and the bank entered the company in its stock-ledger as the holder of the shares. The account was headed, “Estate of late Maurice O.,” with the addition of the name of the company, the date of the death, and the words, “see copy of probate on file.” In 1917, the company, having administered the estate and disposed of the assets except the 50 shares, executed a transfer of the shares from itself as executor to itself as “trustee for” the daughter, naming her, and as such trustee accepted the transfer. The bank closed the then existing account in its stock-ledger by an entry recording the transfer, and opened a new account, headed “N. T. Company, trustee for” the daughter, naming her, and shewing the company as the holder of 50 shares transferred by the same company as executor of O. In 1923 the bank was declared insolvent and ordered to be wound up. No change had been made in the last entry before the commencement of the winding-up:—

Held, that the case came within the provisions of clause (b) of sec. 53 of the Bank Act, 13 & 14 Geo. V. ch. 32, which exempts a trustee from personal liability as a shareholder “if the will or other instrument under or by virtue of which the stock is so held be named in the books of the bank *in connection with such holding*.”

The two entries being connected by the reference in the second account to the transfer from the first, the will was “named” in the books of the bank in connection with the actual holding, whether the holding was as executor or as trustee.

A motion by the liquidators to remove the name of the trust company from the list of contributories holding shares in a representative capacity, and to place it on the list of shareholders who were directly and personally liable, was dismissed; without prejudice, however, to the claim (if any) of the liquidators against the company for failing, when distributing the assets, to retain sufficient to meet any possible claim for double liability on the 50 shares.

AN appeal by the liquidators of the bank from an order of the Master of the Supreme Court, 27 O.W.N. 319.

1925.
RE
HOME BANK
OF
CANADA.

March 16. The appeal was heard by ROSE, J., in the Weekly Court, Toronto.

M. H. Ludwig, K.C., for the liquidators.

H. S. White, K.C., for the National Trust Company.

J. I. Grover, for Sister Mary Evangelista O'Connor.

March 18. ROSE, J.:—This is an appeal by the liquidators of the Home Bank from an order of the Master of the Supreme Court dismissing a motion made by the liquidators for an order to remove the name of the National Trust Company from the list of contributories holding shares in a representative capacity and to place it on the list of shareholders who are directly and personally liable. The trust company holds 50 shares of the stock of the bank in a representative capacity; the question is, whether the case is brought within those provisions of sec. 53 of the Bank Act (13 & 14 Geo. V. ch. 32) which exempt trustees and executors from personal liability as shareholders if certain entries are made in the books of the bank.

The trust company was the executor of the will of Maurice O'Connor, who died in December, 1907. By his will the testator left 50 shares of the capital stock of the bank to his executors in trust to hold the same and during the lifetime of his daughter Sister Mary Evangelista to collect the dividends and accretions and to pay them to the daughter, and after her death to transfer the shares to such charitable institution as she should by will appoint and in default of her appointment to sell the shares and hold the proceeds upon the trusts declared in respect of the residue of the testator's estate, that is to say, after the death of a named niece of the testator, to hold such proceeds in trust for such charitable institutions of a defined class as should be named by the persons entrusted by the will with a power of appointment in that behalf.

After the will had been admitted to probate (which was in January, 1908), the trust company lodged a copy with the bank; and the bank entered the company in its stock-ledger as the holder of the shares. The account is headed as follows: "Estate of late Maurice O'Connor, Guelph: executors, National Trust Company Ltd., Toronto: died 15th December, 1907: National Trust Company, executors (see copy of probate on file)," the words within the brackets being in pencil writing, and possibly having been added after the amendment in 1913 (3 & 4 Geo. V. ch. 9, sec. 15) of sec. 44 of the Bank Act of 1890, as introduced by the amendment of 1900 (63 & 64 Vict. ch. 26, sec. 8). It is immaterial,

however, to ascertain when the words were added. When they had been added, the entry was such an entry as made the position of the trust company perfectly secure under the section in the form in which it has been since 1913. The company held the stock as executor; the will under or by virtue of which the stock was so held was named in the books of the bank in connection with such holding; and the company was not "personally subject to any liability as a shareholder." The difficulty in the case is caused by what happened later.

In 1917, the company, having administered the estate and disposed of the assets except the 50 shares, executed a transfer of the shares from itself as executor to itself as "trustee for Sister Mary Evangelista O'Connor," and as such trustee accepted the transfer; and the bank closed the then existing account in its stock-ledger by writing, under date of the 16th March, 1917, the words, "To National Trust Co., trustees, 50 (shares) 5,000 (dollars);" and it opened a new account, headed "National Trust Company Limited, trustee for Sister Mary Evangelista O'Connor," and shewing the company as the holder of 50 shares transferred by "National Trust Co., executors M. O'Connor." No change had been made in this entry before the commencement of the winding-up.

Obviously, the transfer executed by the company in the one capacity and accepted by it in the other and the corresponding entry in the bank's stock-ledger are incomplete in their description of the capacity in which the company held the shares after or before the transfer. The company held the shares in trust for Sister Mary Evangelista, in the sense that it held them in trust during her life to pay her the income and any accretions, and after her death to transfer them to such charity as she should appoint; but she is not the owner, and, in my opinion, it would be incorrect to say that the company holds the stock as trustee "for any person named in the books of the bank as being represented by" the company. Therefore, I think that the company cannot rest its case successfully upon clause (a) of sec. 53, and that the case must depend upon clause (b), which is the clause upon which the Master bases his judgment.

By clause (b), no person holding stock in the bank as executor or trustee shall be personally subject to any liability as a shareholder "if the will or other instrument under or by virtue of which the stock is so held be named in the books of the bank *in connection with such holding.*" The difficulty is in the words *in connection with such holding.* If nothing is looked at but the

Rose, J.
 1925.
 RE
 HOME BANK
 OF
 CANADA.

Rose, J.
1925.
RE
HOME BANK
OF
CANADA.

last account in the stock-ledger it appears that the company holds as trustee, and that formerly it held as executor of the will of M. O'Connor; but nowhere, in connection with *such* holding as trustee, is there a statement in so many words that the will is the will under or by virtue of which the stock is *so* held; and so, looking at the last account alone, there is an apparent difficulty in bringing the case within the words of the statute.

The difficulty just mentioned is, I think, only apparent. Notwithstanding the form of the transfer, the fact is that the company as holder of the shares is bound by the terms of the will. It holds, not as trustee for Sister Mary Evangelista, but as trustee to pay the income and accretions to her as long as she shall live and after her death to transfer the proceeds of a conversion of the shares to a charity appointed by her or by the donees of the power created by the residuary clause of the will. That is the capacity in which, and those are the trusts upon which, it always held; and what the statute speaks of is the actual capacity in which the shares are held, not the capacity as stated in the books of the bank. The words are, "person holding stock in the bank as executor, administrator, guardian, trustee, tutor or curator;" the company does hold as executor or as trustee under the will; in the first entry in the stock-ledger, which is the only place in the books of the bank in which it is stated that the company holds in that capacity, the will under or by virtue of which it holds is named; and in the later entry, in which it is stated, inaccurately or incompletely, that that holding is as trustee for Sister Mary Evangelista, it is shewn that the shares which the company is said to hold as trustee are the very shares that in the first entry it was said to hold as executor; and I think that, the two entries being connected by the reference in the second account to the transfer from the first, the will is "named" in the books of the bank *in connection with* the holding, whether such holding be as executor or as trustee. Even in the latest account, standing by itself, I think the will under which the company holds is "named;" for the company could not hold as "Executors M. O'Connor" except under Mr. O'Connor's will, and the entry states clearly that the shares which the company is said to hold as trustee for Sister Mary Evangelista are shares which, as executor of Mr. O'Connor's will, it transferred to itself as trustee. I think, moreover, that the will is named "in connection with" the holding; for, although the holding is said to be as trustee for Sister Mary Evangelista, it appears on the face of the entry that it was in exercise of a power supposed to be conferred by the will that the executor purported

to change itself into a trustee. But, however the case might stand if the latest account was looked at alone, it seems to me that when the two connected accounts are looked at there is no doubt that the will is named in connection with the real holding.

In my opinion, the order of the learned Master, including the saving of the claim (if any) of the liquidators against the company for failing, when distributing the assets, to retain sufficient to meet any possible claim for double liability on the 50 shares, is right.

The appeal will be dismissed with costs.

Rose, J.

1925.

RE
HOME BANK
OF
CANADA.

[APPELLATE DIVISION.]

1925.

March 20.

WESTENFELDER V. HOBBS MANUFACTURING CO. LTD.

Negligence—Injury to Invitee in Warehouse—Findings of Jury—Negligence Charged but not Found Considered to be Negatived—Negligence Found not Justifying Judgment in Favour of Injured Person—Evidence—Danger Known to Injured Person—Scienti non Fit Injuria.

The plaintiff, going to the defendants' warehouse to make a purchase, was directed by some one in the office to go to the shipping room. He did so, but entered (without being directed to do so) by a door that was not intended for customers. After giving his order, he was about to leave the building by the same door, but found that he would have to wait until the loading of a dray standing at the door had been completed. While he was standing near the door, waiting, an employee of the defendants arrived wheeling a heavy crate in a hand-truck. When the employee dumped the crate on the floor, it overbalanced and fell, injuring the plaintiff's foot. At the trial of an action to recover damages for his injury, the plaintiff sought to impose liability upon the defendants: (1) because they were negligent in leaving the plaintiff to find his way to the shipping room without adequate instruction and in not seeing that he left the shipping room by the proper exit; and (2) because of the negligence of the employee in permitting the crate to fall as it did. Upon questions submitted to the jury, they found that the defendants were negligent "by not properly directing the plaintiff to and from the shipping room and by not displaying a "No admittance" sign on the outside of the shipping room entrance. Contributory negligence was negatived, and the damages assessed:—

Held, that the jury, having been invited to find negligence in the two respects mentioned, and having answered finding certain negligence to have existed, must be considered to have negatived all the other charges of negligence.

Andreas v. Canadian Pacific Railway Co. (1905), 37 Can. S.C.R. 1, followed.

Held, also, that the negligence found by the jury did not justify a judgment in the plaintiff's favour.

1925.

WESTEN-
FELDER
v.
HOBBS
MANUFAC-
TURING CO.
LTD.

The injury to the plaintiff was not the direct result of his entering or attempting to leave by the wrong door. He was not injured by reason of the condition of the premises, but by reason of the toppling over of the crate while being handled by an employee.

The plaintiff was an invitee when in the shipping room, and the rule laid down in *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311, applied to him; but, in the view of the jury, there was no negligence towards him save that which was insufficient in law to maintain the action, and there was no negligence on the part of the plaintiff in failing to take reasonable care for his own safety.

The judgment for the plaintiff based on the findings of the jury must be set aside and the action dismissed. The plaintiff should not be allowed a new trial, because he knew of the danger of entering and leaving by an irregular way and of the danger of standing by while the employee unloaded his truck. *Scienti non fit injuria*.

Lucy v. Bawden, [1914] 2 K.B. 318, and *Cavalier v. Pope*, [1906] A.C. 428, followed.

APPEAL by the defendants from the judgment of MOWAT, J., upon the findings of a jury, in favour of the plaintiff for the recovery of \$2,200 and costs in an action for damages for injuries to the plaintiff alleged to have been caused by the negligence of the defendants' employees.

March 2 and 3. The appeal was heard by LATCHFORD, C.J., HODGINS, MIDDLETON, and ORDE, J.J.A.

H. J. Scott, K.C., and *J. A. E. Braden*, for the appellants.

N. B. Gash, K.C., for the plaintiff, respondent.

The following authorities were referred to: *Byrne v. Boadle* (1863), 2 H. & C. 722; *Rowan v. Toronto Railway Co.* (1899), 29 Can. S.C.R. 717; *Sewell v. British Columbia Towing Co.* (1884), 9 Can. S.C.R. 527, and cases there cited; *Yorkshire Banking Co. v. Beatson* (1880), 5 C.P.D. 109; *Stewart v. Rounds* (1882), 7 A.R. 515, 519; Halsbury's Laws of England, vol. 21, p. 388, para. 656; *Metropolitan Asylum District Managers v. Hill* (1882), 47 L.T.R. 29.

March 20. The judgment of the Court was read by MIDDLETON, J.A.:—The defendants, glass merchants, are the owners and occupiers of a warehouse in the city of London. On the 5th September, 1923, the plaintiff, having broken the windshield of his automobile, stopped upon the highway near the defendants' warehouse for the purpose of purchasing a new piece of glass. Not being familiar with the locality, and observing a sign, "Apply at the office," he went to the office at the front of the building, and was there given an order, or direction, which he was told to present in the shipping room, where he would receive attention. Understanding in some way that the shipping room was in the

rear of the building, and not being familiar with its internal arrangement, he went from the office to the street, passed around the building, and observing a door leading to the shipping room he entered in that way. This door was not intended for use by customers—it faced upon an alleyway. The floor of the shipping room was upon a level with the top of a waggon or dray drawn up in the alley, and it was intended to be used for the purpose of loading goods from the shipping room upon vehicles. To obtain entrance the plaintiff had to climb upon a vehicle waiting there, and from it enter the shipping room. When he had placed his order, he said that he would go to his automobile and wait there for the glass to be brought to him. His intention was to leave by the way by which he had entered. When he arrived at the door, he found the loading of a dray in progress; and, as he could not conveniently climb down, he stood to one side to wait until an opportunity offered. In the meantime an employee arrived wheeling a heavy crate of glass upon a hand-truck. When the employee dumped this from the hand-truck on the floor, it overbalanced and fell, injuring the plaintiff's foot.

At the trial the plaintiff sought to impose liability upon the defendants upon two distinct theories: first, that the defendants were negligent in leaving the plaintiff to find his way to the shipping room without adequate instruction and in not seeing that he left the shipping room by the proper exit door; and, secondly, because of the negligence of the employee in permitting this crate of glass to fall as it did.

Questions were submitted to the jury upon which they found as follows:—

“1. Was the defendant company, through its servants or agents, guilty of any negligence in its shipping room which caused the injury to the plaintiff? A. Yes.

“2. If you find any negligent act or omission describe it fully. A. We find that the defendants were negligent by not properly directing the plaintiff to and from the shipping room, also by not displaying a ‘No admittance’ sign on the outside of the shipping room entrance.”

Contributory negligence is negatived, and the damages assessed.

Notwithstanding this finding of the jury, Mr. Gash endeavoured to support the verdict upon the theory that the jury must be taken to have found negligence in the handling of the crate of glass.

The decision of the Supreme Court of Canada in *Andreas v. Canadian Pacific Railway Co.* (1905), 37 Can. S.C.R. 1, is a com-

App. Div.

1925.

WESTEN-
FELDER

v.

HOBBS
MANUFACTURING Co.
LTD.

Middleton,
J.A.

App. Div.
 1925.
 WESTEN-
 FELDER
 v.
 HOBBS
 MANUFAC-
 TURING CO.
 LTD.
 Middleton,
 J.A.

plete answer to this contention. The jury, having been invited to find negligence in this respect, as well as others, and having answered finding certain negligence to have existed, "must be considered as having negatived all the other charges of negligence."

Turning then to the negligence found, we do not think it justifies a judgment in the plaintiff's favour. If the defendants ought to have more adequately instructed the plaintiff as to how to reach and enter the shipping room, there was nothing to prevent his making further inquiry, and when he undertook to enter this room through the goods entrance, instead of by a proper entrance, he must have fully appreciated the risk he was taking. But, beyond this, it is plain that the injury to the plaintiff was not the direct result of either entering or leaving in this way. He stood near this improper exit, and while there was injured, not by reason of the condition of the premises, but by reason of the toppling over of this crate while being handled by an employee. The circumstances are such as to lend much force to Mr. Gash's argument addressed to us, and unquestionably addressed to the jury, that the maxim *res ipsa loquitur* applies. But the jury had the benefit of the explanation of the man having charge of the package placed in the box, on behalf of the plaintiff, and have apparently accepted his explanation, and exonerated him from any charge of negligence.

The plaintiff was unquestionably an invitee when in the shipping room, and the rule as to the obligation of the defendants to him is that laid down by Willes, J., in *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311, concerning which it has been said by a very careful writer (32 L.Q.R. 256): "If learning, care, and skill were ever applied in formulating a duty they were here applied by Willes, J. . . . It may be said with truth that he who alters one word of it does so at his peril." This rule is that the invitee, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

This true aspect of the case does not appear to have been presented adequately to the jury: but, in the view of the jury, there was no negligence toward the plaintiff save that which we regard as quite insufficient in law to maintain the action, and there was

no negligence on the part of the plaintiff in failing to take reasonable care for his own safety. If the case stands there, the plaintiff must fail; but, looking at the matter from a wider point of view for the purpose of determining the propriety of granting a new trial, the plaintiff must fail. This is not the case of a dangerous condition of the premises known or which ought to have been known to the defendants. The premises were themselves perfectly safe, and the accident did not arise from anything connected with the premises themselves. The peril which resulted in the accident to the plaintiff arose from the handling of heavy cases while being loaded from the warehouse on the waiting dray. What was going on was perfectly well-known to the plaintiff. It was not an unexpected danger, of which the plaintiff was ignorant, but which was known to the defendants. It was patent to every one.

Under these circumstances, the principle recognised in *Lucy v. Bawden*, [1914] 2 K.B. 318, comes into play. There, as pointed out by Atkin, J., the true maxim is *scienti non fit injuria*, and not, as there contended by counsel for the plaintiff, *volenti non fit injuria*, this being based upon the rule already quoted from the leading cases. This case does not stand alone, for in *Cavalier v. Pope*, [1906] A.C. 428, at p. 432, Lord Atkinson states: "One of the essential facts necessary to bring a case within that principle" (i.e., the principle of *Indermaur v. Dames*) "is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action."

The plaintiff here knew of the danger of entering and leaving in this irregular way, and furthermore knew of the danger of standing by while the warehouseman unloaded his truck.

The appeal must be allowed and the action dismissed.

Appeal allowed.

[APPELLATE DIVISION.]

CONNOR V. CORNELL.

Negligence—Injury to Invitee in Warehouse—Trap—Unusual Danger—Limited Invitation—Qualified Liability.

The plaintiff, an invitee upon the defendant's premises, a warehouse, fell through an open trap-door in the floor, admittedly not sufficiently guarded, and was injured:—

Held, that, although the trap was an unusual danger and unknown to the plaintiff, the defendant's invitation to the plaintiff being limited to a safe part of the premises, the liability of the defendant based

App. Div.

1925.

WESTEN-
FELDER

v.
HOBBS
MANUFACTURING CO.
LTD.

Middleton,
J.A.

1925.

March 20.

App. Div.
1925.
CONNOR
v.
CORNELL.

upon the doctrine of *Indermaur v. Dames* (1866-67), L.R. 1 C.P. 274, L.R. 2 C.P. 311, was qualified, and the defendant was not responsible for the injury to the plaintiff.
Walker v. Midland Railway Co. (1886), 2 Times L.R. 450, and *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, followed.

APPEAL by the defendant from the judgment of LOGIE, J., in favour of the plaintiff for the recovery of \$1,000 and costs in an action for damages for injuries sustained by the plaintiff by falling through a trap-door in the defendant's store, negligence of the defendant being charged and found by the trial Judge, who tried the action without a jury.

March 6. The appeal was heard by LATCHFORD, C.J., HODGINS, MIDDLETON, and ORDE, J.J.A.

D. L. McCarthy, K.C., for the appellant, contended that his liability was commensurate with the scope of the invitation to the plaintiff. The invitation had been limited in extent both as to time and as to place: first, by the fact that the goods were stored in the warehouse and were not there for purposes of inspection; and, secondly, by the words exchanged between the plaintiff and the defendant immediately before the occurrence. Reference to Halsbury's Laws of England, vol. 21, p. 390, para. 657; *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, at pp. 260, 261; *Shaw v. Board of Education of St. Thomas* (1911), 2 O.W.N. 1467, 19 O.W.R. 846; Canadian Bar Review, vol. 2, pp. 24, 92.

A. A. McKinnon for the plaintiff, respondent, argued that the invitation extended to the use of the whole premises. There was a duty upon the defendant to warn the plaintiff that the trap-door was open, when he knew or should have known that, as the plaintiff was to come near it, the natural allurement there is about a place of the kind might lead him that far. Reference to *Southcote v. Stanley* (1856), 1 H. & N. 247, 250, 108 R.R. 549, 552; *Latham v. R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398, 406; *Indermaur v. Dames* (1866-67), L.R. 1 C.P. 274, L.R. 2 C.P. 311; *Kimber v. Gas Light and Coke Co.*, [1918] 1 K.B. 439; *Dickson v. J. A. Scott Ltd.* (1914), 30 Times L.R. 256; *Axford v. Prior* (1866), 14 W.R. 611; *Whiteley v. Pepper* (1877), 46 L.J.Q.B. 436; *John v. Bacon* (1870), 39 L.J.C.P. 365.

March 20. The judgment of the Court was read by MIDDLETON, J.A.:—The defendant is the owner of a produce warehouse in the city of Windsor. While upon these premises for the purpose of purchasing apples, the plaintiff fell down an insufficiently guarded trap-door, and was injured. It is conceded that the

plaintiff was an invitee, and that the trap-door, unguarded as it was, in a poorly lighted part of the warehouse, constituted an unusual danger unknown to the plaintiff; so that, but for the argument to be mentioned, the plaintiff would be entitled to recover upon the principle laid down in *Indermaur v. Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, and it is upon this principle that the judgment appealed from proceeds.

App. Div.
1925.
CONNOR
v.
CORNELL.
Middleton,
J.A.

What is contended is that, although the plaintiff was admittedly an invitee, the judgment ignores the principle laid down in many cases that "the liability of the occupier is only commensurate with the extent of the invitation;" that, in view of what took place, the plaintiff had no invitation to that part of the warehouse where the trap-door was; and that, in entering that part of the warehouse without invitation, he became the author of his own injury.

The facts upon which this argument is based are not in dispute. The warehouse is entered from Sandwich street. Going in a southerly direction, the plaintiff passed the office on the left hand. On his right, extending a considerable distance back, were a large quantity of apples. Apparently, no one was in the office at the time, but the defendant was at the extreme south of the building with a lantern. The defendant called to the plaintiff, asking, "What will you have?" to which the plaintiff replied, "I want some apples." The defendant thereupon pointed to the apples immediately to the right of the plaintiff, and said, "There they are—I will be with you in a minute." The plaintiff then approached the apples, and examined them; but, observing onions to the rear of the warehouse, near where the trap-door was, he passed without any further invitation to the location of the onions, and fell into the trap. The distance travelled was over 20 feet from the cases containing the apples. The defendant's contention really amounts to this, that if the plaintiff had indicated his intention to roam over the warehouse at large he would have had an opportunity of warning him of the danger of the trap-door; but, inasmuch as he only sought to purchase apples, he invited him to remain where the apples were, and so the invitation was limited.

The case of *Walker v. Midland Railway Co.* (1886), 2 Times L.R. 450, recognises this limitation. There a guest at an hotel got up in the night to go to the toilet-room; but, entering another room by mistake in the dark, he fell down an unprotected lift. The defendant was not liable, for its duty toward him was "limited to those places into which guests may reasonably be

App. Div. supposed to be likely to go, in the belief, reasonably entertained,
 1925. that they are entitled or invited to do so." This decision of the
 CONNOR Lords indicates a very important limitation of the main doctrine.
 v. The invitor is not an insurer of the invitee against all accidents
 CORNELL. that may befall him while upon the premises, but his duty is to
 Middleton, protect him against unusual dangers in the place where he is in-
 J.A. vited to go.

In the more recent case of *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, there is much discussion of similar problems, but nothing is really added to the earlier decision.

We think the appeal should be allowed and the action dismissed.

Appeal allowed.

[MIDDLETON, J.A.]

[RIDDELL, J.]

1924.

MUSSON v. HEAD.

Oct. 28.

1925.

March 27.

Vendor and Purchaser — Agreement for Exchange of Properties — Action for Specific Performance — Agreement Signed by Husband of Owner of City Property — Agency — Parol Evidence to Prove—Admissibility—Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5—Contract Containing no Special Description or Assertion of Property—Part of Subject-matter Sold under Order of Court pendente Lite—Rule 371—Terms of Order—Preservation of Rights of all Parties—Practice—Sale not a Bar to Judgment for Specific Performance.

The plaintiff, being the owner of a farm and some stock and implements thereon, agreed with the defendant H., the husband of the other defendant, to exchange the farm and chattels for an equity of redemption in certain buildings in a city. The defendant H. refused to carry out the contract, and the plaintiff brought this action for specific performance. Under the terms of the agreement, H. was bound to take possession of the farm property on a certain day, but refused to do so, and refused to consent to a sale of such part of the chattels as was of a perishable nature.

Upon the application of the plaintiff, an order was made, under Rule 371, authorising the plaintiff to sell the live stock and anything of a perishable nature referred to in the schedule to the agreement, but without prejudice to the rights of the parties in regard to any question which might arise in the action, and with the proviso that the price which should be obtained at the sale was not, in this action, to be taken to be the value of the things sold.

Bartholomew v. Freeman (1878), 3 C.P.D. 316, and *Evans v. Davies*, [1893] 2 Ch. 216, followed.

It appeared that the city property stood in the wife's name; and the principal defence to the action was that she did not execute or give authority to execute the agreement, and that she disapproved of the bargain which her husband had made. The Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5, was pleaded:—

Held, at the trial of the action, that, although parol evidence is not admissible to vary a written contract except in an action brought to vary or set it aside, yet, where in fact a contract is entered into by a person in his own name, but as agent of another, if in the contract itself there is no special description or assertion of property there is no reason why the agency should not be proved by parol and the real principal bound.

Filby v. Hounsell, [1896] 2 Ch. 737, and other cases, applied and followed.

The contract here being in the usual form, with no special description of the contracting parties, and the agency of the husband being proved, specific performance was adjudged.

Held, also, that the sale of the perishable property under the order of the Court referred to above did not stand in the way of a judgment for specific performance, but the plaintiff must account for the proceeds of the sale.

MOTION by the plaintiff for an order as to the disposition and care of certain live stock and other perishable chattels referred to in an agreement forming the subject-matter of this action.

October 27, 1924. The motion was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

P. E. F. Smily, for the plaintiff.

C. H. Porter, for the defendants.

October 28. MIDDLETON, J.A.:—It appears that the plaintiff, being the owner of a farm, together with some stock and implements thereon, agreed with one of the defendants, George Head, to exchange this farm for an equity of redemption in certain buildings in Toronto. For some reason Head refused to carry out this transaction. The plaintiff alleges that this refusal is entirely unjustifiable, and has brought this action seeking specific performance. Under the terms of the agreement the defendant George Head was bound to take possession of the farm property on the 9th October, but he refused to do so. In making this motion the plaintiff is seeking to place upon the Court the responsibility that I think rests upon his own shoulders, and which he cannot shift. He expresses his "desire that the Court should make direction as to the disposal of the marketable live stock, and the care of the balance until the action is disposed of." Notwithstanding this, I think the plaintiff is entitled to some relief.

There are at least three possible results of the litigation. It may be that the plaintiff will fail entirely, and that his contract will prove to be unenforceable. In that case, what shall become of the property in question is clearly a matter of indifference to the defendant. If it should be held that the plaintiff is entitled to specific performance of the agreement for the sale of these chattels,

1924-25.

MUSSON
v.
HEAD.

Middleton,
J.A.
1924
MUSSON
v.
HEAD.

and that they have in the meantime been sold, or if they should have become valueless, the defendants are obviously the ones concerned. It may be that the plaintiff, while entitled to succeed, is not entitled to specific performance, but only to damages. In that case both parties are concerned. The defendants, realising that the plaintiff is in a very awkward situation, and that any action he may take with reference to this live stock and other perishable articles left upon his hands, save by the authority of the Court, may prejudice him in the claim that he is putting forward for specific performance, will not consent to any sale.

The circumstances are somewhat analogous to those in *Bartholomew v. Freeman* (1878), 3 C.P.D. 316, and I think that that case is justification for here making the same order as was there made. I think I should authorise the plaintiff to sell the live stock and anything referred to in the schedule to the agreement which is of a perishable nature, but this must be without prejudice to the rights of the parties as to any question which may arise in the action, and the price to be obtained at the sale is not to be taken to be the value of the things sold in this litigation. The plaintiff must be prepared to justify the price he obtains at the hearing, or at any other stage of the action at which this may become material. The plaintiff will be well advised if he gives to the defendants full notice of what he intends to do by virtue of this order, and an opportunity to make suggestions as to the mode of sale, and the reserved bid to be placed upon the property. This is not made a term of the order, but is a mere suggestion as to the prudent course to be taken. The case referred to and *Evans v. Davies*, [1893] 2 Ch. 216, shew that our Rule 371* justifies the Court in making an order for the sale of perishable goods or goods which it is "desirable to have sold at once," where there is a dispute between vendor and purchaser. The earlier case also shews that the fact that cattle "may eat their heads off" is a reason for directing an immediate sale.

The costs of this application and the expenses of selling are reserved to be dealt with at the trial.

In March, 1925, the action was tried by RIDDELL, J., without a jury, at a Toronto sittings.

Gideon Grant, K.C., and *P. E. F. Smily*, for the plaintiff.

M. A. Secord, K.C., and *C. H. Porter*, for the defendants.

*371. The Court may, at any time, order the sale, in such manner and on such terms as may seem just, of any goods, wares, or merchandise which may be of a perishable nature or likely to be injured from keeping, or which for any other reason it may be desirable to have sold at once.

March 27. RIDDELL, J.:—The plaintiff had a farm in Reach township which he wished to dispose of; through Williams, a real estate agent in Toronto, he got in communication with the defendants, husband and wife, who lived in an apartment-house in Toronto, which was in the wife's name.

Riddell, J.

1925.

MUSSON

v.
HEAD.

After some negotiations, the two defendants went down to the plaintiff's farm with the real estate agent to examine the farm with a view to an exchange—the husband, with the wife's knowledge, examined the farm and approved of the property—terms of the exchange were agreed upon and reduced to writing and signed by the plaintiff and the male defendant—it being thought unnecessary to have the female defendant sign. She was told by her husband, "Now the farm is ours;" and expressed her satisfaction with the transaction. Final papers were drawn up, and a day arranged to close. The solicitors met and adjusted all matters; Mr. Porter, solicitor for the defendants, having an engagement, the deeds were not actually delivered, but stood over for the next day. Then there seemed to be an objection apparently arising from the son of the defendants.

But afterwards the solicitor received instructions to proceed—the defendants began negotiating for an exchange of the farm for another property and treated the farm as their own.

Finally there was a refusal to carry out the original contract; the proper documents were tendered by the plaintiff's solicitors and this action begun.

The female defendant defends on the ground that she did not execute or give authority to execute the contract; and pleads the Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5, i.e. sec. 4 of the original Statute of Frauds; the male defendant says that his wife disapproved of the deal. There are other defences, but that is the substance.

I may say that the defence is a gross piece of dishonesty—an attempt to use the Statute of Frauds to commit a flagrant fraud such as shocks the sense of justice of any honest man. But nevertheless the defendants are, in a court of law, entitled to take advantage of any defence valid in law even if not in morals.

When the defence of the female defendant is reduced to its lowest terms, it is that the husband signed as owner, and the law prevents evidence to prove that he was not.

This argument is based upon a misinterpretation of a case in the Supreme Court of Canada, *Katzman v. Ownahome Realty Co.*, [1924] S.C.R. 18. In that case B.K. had, with or without the

Riddell, J. authority of her husband, entered into a contract in writing and
 1925. "expressly purported to contract . . . as owner of the property;"
 MUSSON and it was held that it would be "to contradict a material state-
 v. ment in the writing" to permit such a claim to prevail (p. 23)—she
 HEAD. had described herself and signed as the owner of the property (p.
 24). Consequently such cases as *Humble v. Hunter* (1848), 12 Q.B.
 310, and *Formby Brothers v. Formby* (1910), 102 L.T.R. 116,
 were followed.

It should be remembered that this principle is part of the general law, no part of the learning of the Statute of Frauds.

In the former case the contract was a charterparty, and Humble described himself as "owner of the . . . ship." It was held that, as he described himself as "owner" in the contract, that could not be departed from. Wightman, J., at p. 316 gives the true principle: "I thought at the trial that this case was governed by *Skinner v. Stocks* (1821), 4 B. & Ald. 437. But neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject-matter of the contract. Here the plaintiff describes himself expressly as 'owner' of the subject-matter. This brings the case within the principle of *Lucas v. De La Cour*" (1813), 1 M. & S. 249. In *Lucas v. De La Cour* one partner made a contract, describing it as his own business, and it was held that the partnership could not take advantage of it without the consent of the other party; for, as Denman, C.J., puts it (p. 317 of the case in 12 Q.B.). "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract."

In *Formby Brothers v. Formby*, 102 L.T.R. 116, one party to the contract was called the "proprietor," and it was held that evidence could not be given to prove that he was not the proprietor "because it would contradict the written contract" (p. 117).

The principle is clear enough—parol evidence is not admissible to vary a written document except in an action brought to vary or set it aside. This principle has been enunciated in a hundred cases and in many different ways—the case in our Courts generally cited is *McNeeley v. McWilliams* (1886), 13 A.R. 324.

Accordingly, if the agent contract in such terms as that by the contract itself he is and can be the only principal—if he "give himself any special description or make any assertion of title to the subject-matter of the contract"—he alone is bound or can take advantage of the contract. But it is not every case in which this happens: e.g., in *Fred. Drughorn Ltd. v. Rederiaktiebolaget Transatlantic*, [1919] A.C. 203 (Dom. Proc.), it is decided that describ-

ing a person as "charterer" does not preclude evidence that the contract was made on behalf of others. Riddell, J.

1925.

MUSSON

v.

HEAD.

Where in fact a contract is entered into by a person in his own name but as agent of another, if in the contract itself there is no special description or special assertion of property there is no reason why the agency should not be proved and the real principal bound; as is said by Romer, J., in *Filby v. Hounsell*, [1896] 2 Ch. 737, at p. 740, "For the purpose of satisfying the Statute of Frauds it appears to me sufficient, so far as parties are concerned, that the written contract should shew who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of the agency from the written document or not. Who the principals are may be proved by parol. That is well settled. This was pointed out by Wood, V.-C., in *Morris v. Wilson* (1859), 5 Jur. N.S. 168, and by Sir George Jessel in *Commins v. Scott* (1875), L.R. 20 Eq. 11, 15, 16, where he says: 'There can be no doubt that if a written contract is made in this form, "A.B. agrees to sell Blackacre to C.D. for £1000," then E.F., the principal of A.B., can sue G.H., the principal of C.D., on the contract.'"

Our own case of *Sanderson v. Burdett* (1871), 18 Gr. 417, is in the same sense. Cf. *Watteau v. Fenwick*, [1893] 1 Q.B. 346; *Kinahan & Co. Ltd. v. Parry*, [1910] 2 K.B. 389; *S.C.*, [1911] 1 K.B. 459.

The contract is in the usual form, with no special description of the contracting parties; and *Filby v. Hounsell* applies.

Remains to be considered the objection that the stock, part of what the plaintiff was to convey, has been sold by him, and consequently specific performance will not lie.

But this sale was made under an order of the Court (see the reasons of Middleton, J.A., *supra*) which preserved the rights of all parties and was really for the advantage of the defendants.

This order is not to be questioned here: it establishes in our Courts an exceedingly valuable practice, and should have its full effect.

The ordinary judgment for specific performance will go—reference to the Master, to include determination of the amount for which the plaintiff will account by reason of the sale of the stock.

The defendants will pay the costs.

[MOWAT, J.]

1925.

DOYLE v. DEADY.

March 28.

Marriage—Declaration of Nullity—Marriage Act, R.S.O. 1914, ch. 148, secs. 15, 36—Amending Acts (1919) 9 Geo. V. ch. 35, secs. 2, 4, and (1921) 11 Geo. V. ch. 21—Requirements of—Non-compliance with—Invalid Ceremony—Authority of Celebrating Minister and Deputy Issuer of Licenses — Constitutional Law — Statutes Declared intra Vires.

The Marriage Act, R.S.O. 1914, ch. 148, and its amendments, are *intra vires* the Provincial Legislature in so far as they provide for dissolution or nullity of a marriage.

Stewart v. Stewart (1924), 56 O.L.R. 57, followed.

Upon evidence sufficient to answer the requirements of the Act and amendments, it was adjudged and declared that a valid marriage was not effected or entered into between the parties and that the form of marriage was null and void.

The failure to give the evidence required by the Marriage Law Amendment Act, 1921, as to the authority of the minister who purported to solemnise the marriage and of the person who issued the license, was remarked upon.

ACTION for a declaration of the invalidity of a form and ceremony of marriage, which the parties took part in, to constitute a valid marriage.

The action was tried by MOWAT, J., without a jury, at a Toronto sittings.

G. C. Price, for the plaintiff.

W. B. Common, for the defendant.

Edward Bayly, K.C., for the Attorney-General for Ontario.

The Attorney-General for Canada sent a letter intimating that he did not desire to be represented.

March 28. MOWAT, J.:—Action for a declaration of the invalidity of a marriage and that a form of marriage was and is null and void.

The sections of the Marriage Act of Ontario, R.S.O. 1914, ch. 148, invoked are sec. 15 as enacted and amended by the Marriage Law Amendment Act, 1919, 9 Geo. V. ch. 35, sec. 2, and sec. 36 as amended by the same Act, sec. 4.

The defendant was 21 and the plaintiff 17 and two months old at the date of the marriage, the 16th February, 1925, and it was solemnised by a Methodist minister; but there is no evidence that

he was authorised to solemnise it, as required by the Marriage Law Amendment Act, 1921, 11 Geo. V. ch. 51.*

The marriage license was not put in evidence. But it was said to have been issued by a Justice of the Peace; and there is no evidence that the Justice of the Peace was a deputy issuer approved in writing by the mayor or reeve of the municipality, as also required by the Act of 1921.

The marriage license was enabled to be procured because of the sworn falsehood that the plaintiff was aged 18.

I find, upon evidence which I believe, that:—

1. The female party was not 18 years of age.
2. Her father did not consent in writing before the issue of the marriage license.

3. The parties have not after the ceremony cohabited and lived together as man and wife, or consummated the marriage.

4. Carnal intercourse did not take place between the parties before the ceremony.

I, therefore, as required by the Act of 1919, declare and adjudge that a valid marriage was not effected or entered into and that the form of marriage is null and void.

There will be no costs of the action as between the parties. The defendant will pay the costs of the Attorney-General for Ontario.

Several cases were decided before the amending Acts and before the opinion of the Judicial Committee (*In re Marriage Legislation in Canada*, [1912] A.C. 880); and some of the Judges—although without the benefit of argument—doubt that the Marriage Act and its amendments are *intra vires* the Provincial Legislature in so far as they provide, under the head “celebration of matrimony,” for dissolution or nullity of a marriage, which is substantially divorce. But I defer to the opinion of my brother who decided the latest case—*Stewart v. Stewart* (1924), 56 O.L.R. 57—and it may be hoped that in a contested case there may soon arise an opportunity for a determining decision; as the people should be enabled to be free from doubt of the status either of their marriages or their pronounced separations.

Mowat, J.

1925.

DOYLE

v.

DEADY.

* By that Act, registration of persons authorised to solemnise marriage is required.

[APPELLATE DIVISION.]

1925.

ROBINS v. NATIONAL TRUST CO.

April 3.

Will—Admission to Probate—Action to Set aside Probate—Delay in Launching—Mental Incapacity of Testator—Failure to Prove—Suspicious Circumstances Surrounding Execution of Will—Failure to Shew—Onus of Proof—Application for New Trial—“Opinion Evidence”—Evidence Act, sec. 10—Limitation of Number of Witnesses—Evidence of Professional Witness—Objection to Portion as Inadmissible—Evidence of a Defendant Taken on Commission—Objection to Admission at Trial—Discretion of Trial Judge—Discovery of Fresh Evidence—Corroborative Testimony—Inadmissibility.

The testator died in 1915, leaving a will executed about a year before his death, letters probate of which were shortly afterwards granted to the executors named therein by the proper Surrogate Court. More than eight years after the grant, and after the death of many important witnesses, the plaintiff, whose sole interest was as a legatee under a will made in 1901, launched this action in the Supreme Court of Ontario for a declaration that the will executed in 1924 was not the true last will of the testator, for the annulment of the grant, and to establish the will of 1901:—

Held, that the evidence did not establish that the testator was not mentally capable of making a will at the time when the will of 1914 was executed.

(2) That the plaintiff had failed to shew such suspicious circumstances surrounding the preparation and execution of the will as would justify the Court in holding that it should not be sustained.

After letters probate have been granted, even upon proof in common form only, mere suspicious circumstances are not sufficient, when the will is attacked in the Supreme Court, to shift upon the executors the onus of establishing the validity of the will.

Larocque v. Landry (1922), 52 O.L.R. 479, followed.

(3) That the plaintiff had failed to establish that there was any infringement by the trial Judge of the provisions of sec. 10 of the Evidence Act in allowing more than three expert witnesses to be called for the defence.

The two witnesses to the execution of the will, who were not professional men, were not to be regarded as “persons entitled, according to the law or practice, to give opinion evidence,” because they were asked as to the testator’s mental condition when he signed the will.

(4) That, whether a portion of the testimony of a professional witness objected to as inadmissible was so or not, no substantial ground for the granting of a new trial because of it was shewn.

(5) That no substantial reason for granting a new trial upon the ground that the evidence of the testator’s widow, taken on a foreign commission issued by the plaintiff, was improperly admitted, was shewn. The evidence was tendered at the trial by the defendants the executors and admitted; the widow was herself a defendant; and the plaintiff’s objection was that, as she had refused to answer certain questions upon her examination, and had not come forward to testify at the trial, it was not proper for the defendants who tendered the evidence to seek to get the benefit of the answers which she gave without also having the answers which she withheld. While there might be some force in the objection, the trial Judge had a discre-

tion, and there appeared to be no ground upon which the plaintiff could object to evidence adduced by him being admitted on behalf of defendants other than the widow.

- (6) That the discovery since the trial of evidence which might assist the plaintiff was not a ground for granting a new trial, the evidence being admittedly merely corroborative of evidence already given on behalf of the plaintiff.

AN appeal by the plaintiff from the judgment of MOWAT, J., at the trial, dismissing an action brought for the purpose of obtaining a declaration of the Court that a testamentary document, executed on the 27th February, 1914, by Edward Chandler Walker, now deceased, was not his last will and testament, and for the annulment of letters probate thereof granted by a Surrogate Court, and for a declaration that a testamentary document executed on the 21st December, 1901, under which the plaintiff, though a stranger by blood, was a legatee, was the true and last will of the testator.

November 5, 6, 7, 17, and 18, 1924. The appeal was heard by LATCHFORD, C.J., MIDDLETON, MASTEN, and ORDE, JJ.A.

O. E. Fleming, K.C., and *Gideon Grant*, K.C., for the appellant, contended that the evidence shewed the testator's mental capacity to have been that of a vegetable—he could think with help, but had been weakened physically and mentally by disease. There were other circumstances shewn by reason of which the will itself came within the words “unusual or unnatural or revolutionary” used in *Murphy v. Lamphier* (1914), 31 O.L.R. 287, at p. 318, and which should “breed suspicion.” Reference to *Donnelly v. Broughton*, [1891] A.C. 435, 442; *Lloyd v. Robertson* (1916), 35 O.L.R. 264, 37 O.L.R. 498; *Lamb v. Brown* (1923), 54 O.L.R. 443. [MIDDLETON, J.A., referred to *Faulkner v. Faulkner* (1919), 44 O.L.R. 634, 636, 46 O.L.R. 69, 70.] By reason of the circumstances, the onus of proving the validity of the will affirmatively was thrown upon the defendants. Reference to *Larocque v. Landry* (1922), 52 O.L.R. 479; *Badenach v. Inglis* (1913), 29 O.L.R. 165; *Barry v. Butlin* (1838), 2 Moo. P.C. 480; *Deremore v. Trusts and Guarantee Co. Ltd.*, [1919] 1 W.W.R. 681, 683; *Tyrrell v. Painton*, [1894] P. 151; *Harwood v. Baker* (1840), 3 Moo. P.C. 282, 290; *Burdett v. Thompson* (1873), L.R. 3 P.&D. 72, note; *Boughton v. Knight* (1873), *ib.* 64; *Campbell v. Campbell* (1889), 130 Ill. 466; *Delafield v. Parish* (1862), 25 N.Y. 9; *Wilson v. Mitchell* (1882), 101 Penn. St. 495; *Marsh v. Tyrrell* (1828), 2 Hagg. Ecc. 84, at p. 121, referred to in *Murphy v. Lamphier* (*supra*); *Wilson v. Wilson* (1875-6), 22 Gr. 39, 24 Gr. 377, 389; *Mitchell v. Thomas* (1847),

1925.

ROBINS

v.

NATIONAL
TRUST Co.

App. Div.
1925.
ROBINS
v.
NATIONAL
TRUST CO.

6 Moo. P.C. 137. In the alternative, there should be a new trial. Expert evidence had been admitted contrary to sec. 10 of the Ontario Evidence Act: *Rice v. Sockett* (1912), 27 O.L.R. 410. Reference also to *Rutzen v. Farr* (1835), 4 A.&E. 53, 56, 57; *Wright v. Doe d. Tatham* (1837), 7 A.&E. 313; 29 Cyc. 781, note, adopted in *Boyd v. Larson* (1918), 42 D.L.R. 516, at p. 518, affirmed in *Larson v. Boyd* (1919), 46 D.L.R. 126; *Scamen v. Canadian Northern Railway Co.* (1912), 6 D.L.R. 142; *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; *Gregson v. Taylor*, [1917] P. 256; Taylor on Evidence, 11th ed., vol. 2, p. 967; *McFall v. Smith* (1889), 32 Ill. App. 463; *Haish v. Munday* (1882), 12 Ill. App. 539. Dr. Armour's evidence had been improperly admitted, for he had been allowed to express an opinion as to the testator's capacity, when the facts upon which he based it had not been shewn to be within his knowledge, and, at least in part, had not been in evidence: 28 Amer. & Eng. Encyc. of Law 99; Taylor on Evidence, 11th ed., vol. 2, p. 968; *Jones v. Hough* (1879), 5 Ex. D. 115, 125; *Hodson v. Midland Great Western Railway Co.* (1877), Ir. R. 11 C.L. 109; *Larson v. Boyd*, 46 D.L.R. 126, 130. The testimony of the testator's widow, taken upon a foreign commission, was also improperly admitted. New and better evidence had been discovered since the trial, which further warranted a rehearing: *Madill v. McConnell* (1908), 16 O.L.R. 314, 17 O.L.R. 209.

J. H. Rodd, K.C., *Glyn Osler*, K.C., and *H. C. Walker*, for the defendants the National Trust Company, respondents, *I. F. Hellmuth*, K.C., and *D. W. Saunders*, K.C., for the defendants Walker, Elizabeth Brunton, and Mary W. Cassels, respondents, and *I. Levinter*, for the defendants the trustees of the Hotel Dieu, Windsor, respondents, were not called upon.

April 3, 1925. The judgment of the Court was read by ORDE, J.A.:—At the conclusion of the argument of counsel for the appellant we stated that we would not then call upon counsel for the respondents, but would do so later if we should think it necessary.

That intimation made it fairly plain that the appellant had failed to convince us that there was any ground for the reversal of the judgment of the learned trial Judge, and we might well say no more, and merely dismiss the appeal.

But the magnitude of the amount involved, and the length and detail of the arguments advanced in the attack upon the will, perhaps require some statement of our reasons for affirming the judgment below.

The grounds upon which the appellant's arguments are based are:—

1. That the evidence establishes that the testator was not mentally capable of making a will at the time when the alleged will was executed.

2. That the evidence discloses certain suspicious circumstances surrounding the preparation and execution of the instrument which shift upon the defendants the onus of establishing it as a testamentary instrument, and that they have failed to satisfy that onus.

3. Or, in the alternative that there should be a new trial: (a) because the trial Judge allowed more than three expert witnesses to be called by the defendants in breach of sec. 10 of the Ontario Evidence Act, R.S.O. 1914, ch. 76; (b) because the evidence of Mary Griffin Walker, the widow of the testator, taken upon commission, was improperly admitted; and (c) because of the discovery since the trial of new evidence.

The difficulties in the plaintiff's way are obvious. The action is launched more than eight years after the death of the testator and the probate of the will in question, and after the death of many important witnesses, including the solicitor who drew the will and the two brothers of the testator, who, it is charged, were instrumental in procuring its execution.

Edward Chandler Walker was born about 1851, and died on the 11th March, 1915, leaving a will dated the 27th February, 1914. Probate of this will, in common form, was granted shortly after his death by the Surrogate Court of the County of Essex to the National Trust Company, the executors therein named. The will contained a large number of legacies in cash and in bonds, amounting in all to several hundred thousand dollars. Many of these legacies will be found to have been improperly paid if the will is now declared invalid. The testator was a son of the late Hiram Walker, the founder of the distillery at Walkerville, and he and his two brothers, Franklin Hiram Walker (sometimes referred to in the evidence as "Frank" Walker) and James Harrington Walker (sometimes referred to as "Harry" Walker) controlled and practically owned the distillery. The testator was married but had no children.

The plaintiff was in no way related to the Walker family. His sole interest in attacking the will at this late date rests upon the fact that there was in the latest known prior will to that in question, made on the 21st December, 1901, a legacy to him of 1,000 shares of the capital stock of Hiram Walker & Sons Limited.

The plaintiff was an accountant and entered the employment of the Walker distillery firm in 1888, and continued in their em-

App. Div.

1925.

ROBINS

v.

NATIONAL
TRUST Co.

Orde, J.A.

App. Div.
1925.

ROBINS
v.
NATIONAL
TRUST CO.

Orde, J.A.

ployment and in that of the joint stock company into which, in 1890, the partnership business was converted, until the year 1912, when he left the service of the company. Shortly afterwards he left Canada to reside in England; and, although he was later aware of E. C. Walker's death, he did not learn of the legacy to himself contained in the earlier will until the year 1922. On the 23rd June, 1923, he launched this action.

No useful purpose will be served by attempting to review all the evidence adduced at a trial which lasted eight days. It has already been elaborately summed up in the judgment of the learned trial Judge.

That the plaintiff was a valued servant of the company is not questioned. His salary in 1891 was \$7,500 per annum; in 1895 it was \$9,000; in 1896, \$10,000; and in 1897 it became \$15,000, and so remained until 1912. But in 1898 the plaintiff received, either as a bonus or by way of additional remuneration, \$25,000 of the capital stock of the company, and in 1905 a further \$75,000 of its capital stock. In addition to this, in the year 1907, and thereafter until he left the company's service, he received, as further remuneration by way of commission upon profits, sums varying from \$15,000 to \$23,000 per annum, so that during the last six years of his employment his remuneration averaged \$34,311 per annum. This steady increase in his remuneration and the bonus of \$100,000 of stock would of themselves indicate that he occupied a position of trust and responsibility in the management of the company. Nor can there be any doubt as to his having been on terms of close friendship with the three Walker Brothers and particularly with Edward. Edward's confidence and friendship are evident from the fact that by the will of 1901 he appointed the plaintiff one of his executors and made him the handsome gift of the 1,000 shares. The value of that gift may be gathered from the price of \$300 per share which the plaintiff procured for certain shares when he left the company in 1912.

In 1905 there was some friction between the plaintiff and the directors of the company, the plaintiff asserting that his services were not fully appreciated or rewarded. This difficulty was adjusted by the issue or transfer to the plaintiff of the 750 shares (\$75 000 par value) already mentioned, and the increase two years later of his remuneration to about \$34,000 per annum.

In 1912 differences again arose between the plaintiff and the company; and, after the unsuccessful efforts of the late Mr. Z. A. Lash, K.C., who was not only legal adviser to the company but also to the Walker brothers, to adjust matters, the plaintiff's en-

gement with the company came to an end and he left the company's services.

A few months later, Edward C. Walker commenced to consider the making of a new will. In November, 1913, he executed a codicil which revoked the appointment of his two brothers and the plaintiff and one Aikman as his executors, and substituted the National Trust Company. In December, 1913, a further codicil was prepared which revoked certain clauses of the will of 1901, among them being that containing the gift of 1,000 shares to the plaintiff, but there was no evidence that this codicil was ever executed. A copy of the draft was put in. Shortly afterwards the will in question was prepared by the late Mr. Lash, after personal interviews and correspondence with the testator, and was executed by the testator, in his house in Walkerville, on the 27th February, 1914.

The death of Mr. Lash and of the testator's two brothers renders it impossible to get all the facts connected with the preparation and execution of the will in question, but there was evidence upon these points adduced at the trial amply sufficient, in our opinion, to support the findings of the learned trial Judge. Mr. J. H. Coburn, K.C., of Walkerville, had been the local solicitor of the three brothers and of the company for many years. He had witnessed the 1901 will, and had drawn a short codicil to it for the testator in 1903 or 1904. Under instructions from the testator, he drew the codicil of November, 1913, which was executed, and also the intended codicil of December, 1913. He says that shortly before the November codicil was drawn the testator sent for him and told him he was thinking of making a new will and wanted him to attend to it, but that he had not yet made up his mind what he wanted to do. He asked Mr. Coburn to prepare the codicil changing his executors (the November codicil) and said that would do in the meantime. Later, he gave instructions for the December codicil, saying that he did not have his full instructions ready for the new will. Mr. Coburn says that the testator had the 1901 will before him when giving these instructions and that he said that circumstances had changed and he wanted to make certain changes on that account.

Shortly after this, some time in January, 1914, Mr. Lash went to Walkerville from Toronto and received instructions from the testator for the preparation of the new will. Exactly what took place between Mr. Lash and the testator cannot be wholly known, but the widow of the testator, who, though a defendant, was called as a witness by the plaintiff, says that Mr. Lash came to the house and had breakfast and that he and the testator went to the latter's

App. Div.

1925.

ROBINS
v.

NATIONAL
TRUST Co.

Orde, J.A.

App. Div.

1925.

ROBINS
v.NATIONAL
TRUST CO.

Orde, J.A.

office immediately afterwards. Mr. Walker returned to the house for lunch and went back to the office immediately afterwards, and returned to the house again late in the afternoon with Mr. Lash, who stayed to dinner and spent the evening with Mr. and Mrs. Walker before returning to Toronto by the night train. Mr. Lash may have made written notes of his instructions; but, apart from certain memoranda in his handwriting on the 1901 will itself and two letters written by Mr. Lash to the testator on the 28th January, 1914, and the 16th February, 1914, no written memoranda are forthcoming. The 1901 will was before Mr. Lash, and is put in with numerous pencil notes in his handwriting upon it. These notes consist of certain additions, alterations, and erasures, and opposite several paragraphs appear the initials "O.K." or the word "out" or the word "dictated." Whether or not these notes were made during the course of the interview with the testator, or afterwards by way of instructions to the person who typed the new will, or partly at one time and partly at the other, must be mere conjecture. Many paragraphs of the old will are repeated verbatim in the new will, though differently numbered, and the fact that the day and month in the testimonium clause are surrounded with pencil lines, and the year changed to "fourteen" would indicate that the old will was used by the typist when engrossing the new one.

The gift to the plaintiff appears in paragraph 20 of the old will, and opposite this paragraph is the memorandum "out" in Mr. Lash's handwriting. This is one of the paragraphs which, according to the instructions given to Mr. Coburn by the testator, was to be revoked by the intended codicil of December, 1913.

On the 28th January, 1914, Mr. Lash wrote Mr. Walker enclosing the first part of the new will for his consideration. According to the letter, this contained the special clauses relating to the homestead and his wife's annuity. The letter mentions other matters and speaks of going to Walkerville, if the testator desires it, to discuss anything or to make any alterations. Then, on the 16th February, 1914, Mr. Lash writes again, saying that he has completed the will, which he encloses. He explains how it should be executed, and again says that if there is anything the testator wishes to discuss he will go up for the purpose, but he suggests that the will should be signed and that any additional provisions can be made by codicil. The letter also draws attention to the fact that he had changed two of the legacies to educational institutions, giving his reasons therefor. The amount involved in these two legacies was \$35,000, a trifling sum out of a total estate of more

than four millions. And the letter indicates, and the natural assumption is, that the objects of the testator's bounty in this regard had been chosen by the testator with the view of assisting certain institutions in which Mr. Lash was interested.

The will was not executed until the 27th February, 1914. It was signed by the testator, at his house, in the presence of John A. McDougal and Robert L. Daniels, both of whom had been in the employment of the Walker family for more than 20 years, and who occupied positions of trust and responsibility in one or more of the several companies in which the Walkers were interested. Mr. Harrington Walker asked McDougal to get Daniels, and to go with him up to the testator's house to witness his will. They drove up in the afternoon, and when they arrived they found the testator fully dressed and waiting for them at a table in a room downstairs. There was very little conversation, if any. Some mention was made of the execution of the will, and it was thereupon signed by the testator and then witnessed by McDougal and Daniels. Mr. Harrington Walker and the two witnesses then left.

Now, here is a will prepared after instructions given during the course of a whole day's personal contact with the testator both in his office and at breakfast and dinner and afterwards in his home, by a gentleman who in his lifetime ranked among the leaders of the bar, who had for some years been Deputy Minister of Justice at Ottawa, and who was considered one of the ablest and soundest solicitors in Canada, and executed, so far as the attesting witnesses were concerned, by one who appeared to know what he was doing. That the will was not read over or discussed in the presence of the two witnesses is of no consequence. It would have been most unusual for a wealthy man either to read aloud, or to have read to him, or even to discuss, a long will containing many provisions of an intimate and private nature, in the presence of two of his own employees. Eight years after the testator's death, this will is attacked on the ground that the testator was not mentally competent to make a will at the date of its execution. This attack involves the implication either that Mr. Lash spent a whole day with and received instructions from a man who was not aware of what he was doing or that he was in some direct or indirect way a party to a fraud upon the testator in drawing and procuring the execution of a will which did not in fact embody the testator's wishes, assuming him to have been capable of expressing them. In the circumstances, the plaintiff's task would appear to be well-nigh hopeless, but he undertakes it with an energy and determination worthy of a better cause.

App. Div.

1925.

ROBINS

v.

NATIONAL
TRUST Co.

Orde, J.A.

App. Div.

1925.

ROBINS

v.

NATIONAL
TRUST CO.

Orde, J.A.

What is the evidence on which the plaintiff relies? Three physicians are called for the plaintiff, Dr. C. W. Hoare, Dr. P. A. Dewar, and Dr. Burt R. Shurley. The testator had not been in good health for many years, he was never a robust man, and there is no doubt that during the later years of his life he was suffering from arterio-sclerosis, from some bowel trouble, and at times from aphasia.

Dr. Hoare had attended him between the years 1891 and 1907. He says there was at times a good deal of confusion in his mental condition, and that there was "slightly progressive degeneration of the mental faculties and nervous system," and yet during the period covered by Dr. Hoare's visits the testator was attending to his ordinary business, except during the "periods of disability," as Dr. Hoare terms them.

Dr. Dewar attended the testator between 1910 and 1913. He says he was called in frequently, and that he probably saw Mr. Walker at his worst times. On these occasions he talked with some difficulty, there was some confusion of ideas, and he had some difficulty in walking. He says, speaking of Mr. Walker's condition in 1913, that "any time I saw Mr. Walker I would have no hesitation in saying I would not think he would be capable of making that will" (i.e. the 1914 will) "himself. He could not instigate the thing or carry it through. He might understand a simple will when it was put in very plain language to him, and he was given plenty of time to think." But Dr. Dewar admits that on one occasion he was surprised to find the testator talking intelligently about some matters. And, as he saw the testator only at his worst, he is forced to admit that his conclusions as to the testator's mental powers are based upon inferences drawn from his tendency to get confused in his conversation when he, Dr. Dewar, was called in to see him. The value of the conclusions so drawn may be tested by his statement that from what he saw he would not expect the testator to have been able to give weight and consideration to any important business deal late in 1912.

In the teeth of these conclusions of Dr. Dewar's, we have the evidence afforded by the correspondence between the plaintiff on the one hand and the testator and Mr. Lash on the other, during the summer of 1912, to which fuller reference will be made later. How can Dr. Dewar's opinion be reconciled with the overwhelming evidence afforded by the existence of these voluminous letters, written by the plaintiff himself, and containing not the slightest suggestion of mental incapacity or impairment in Edward Walker.

but rather suggesting that he was still one of the dominating factors in the management of the company?

Dr. Shurley, of Detroit, first began his attendance in November, 1913. His evidence, if it stood alone, would undoubtedly create the impression that during this period the testator was wholly lacking in mentality. He describes the testator as a "vegetable" and as like a child. But he admits on cross-examination that the testator may have had his good days, and there is so much of this physician's opinion that is plainly contradicted by the facts that its value is completely destroyed. It is utterly inconceivable that Mr. Lash and Mr. Coburn could have had such prolonged interviews and received instructions from a man in the hopeless mental condition which Dr. Shurley describes.

In the face of Mrs. Walker's evidence as to her husband's mental and physical condition during the period in question, of the evidence of the two witnesses to the will as to the testator's condition the day he signed it, and of the physicians called by the defendants, of the fact that he went to and from his office on the day of Mr. Lash's visit and spent hours of that day with Mr. Lash, of Mr. Coburn's evidence as to his condition when giving instructions for the November and December codicils, and of many other pieces of evidence as to the testator's ability to transact business during the period when the will was in preparation and was executed, can the Court possibly hold that the plaintiff has made out the case he set himself to establish? The signature to the will itself gives no indication of having been appended by a "vegetable," and is as well written as that in the 1901 will.

It is rather remarkable that the plaintiff should now seek to prove that for many years before the execution of the will the testator's mental powers had been steadily deteriorating, when, up to the late summer of 1912, he corresponded with him as if he were possessed of all his mental faculties and could still give effect to his wishes with respect to the company and what was due the plaintiff as a servant of it. Several letters written by the plaintiff to Mr. Lash and to the testator, during the summer of 1912, were put in, among them two very long ones to the testator dated the 14th and 20th August, 1912. In these two letters the plaintiff discusses his relationship to the business and the justice of his claim to a greater remuneration in great detail. It is quite clear from the opening words of the later letter that he and the testator had discussed the matter, and it is abundantly clear that the plaintiff regarded the testator as still one of the dominating influences in the management of the business, with power to turn the decision

App. Div.

1925.

ROBINS

v.

NATIONAL
TRUST CO.

Orde, J.A.

App. Div.

1925.

ROBINS
v.NATIONAL
TRUST Co.

Orde, J.A.

one way or the other upon the matters then under discussion. Nor is there anything in the plaintiff's letters to Mr. Lash during the same period to indicate that the testator was not in full possession of his faculties or was in any way incapable of disposing of matters of business. Throughout these letters the three brothers are all mentioned individually. It is true that the antagonism to the plaintiff seemed to come from one of the testator's brothers, and Harry and Frank are mentioned oftener than Edward, but nowhere is there a suggestion that Edward has no voice in the matter. On the contrary, there are frequent references to him as if his decision would in effect settle the difficulty in the plaintiff's favour, though doing so might involve a rupture with the antagonistic brother.

Counsel for the plaintiff laid much stress upon the fact that the testator's widow had objected to the provision which the testator had made for her, and had threatened to attack the will. The difficulty then raised was adjusted with the assistance of Mr. Lash, by an agreement with the two surviving brothers. Though Mrs. Walker was examined on commission on behalf of the plaintiff, there was no evidence to indicate that her objections to the will arose from any doubt as to her husband's mental capacity, and I can see no warrant for assuming that she had any such idea whatever. It is not unusual for wives and other relations, who think that a testator has not seen fit to give them all they think they ought to get, to threaten to "break the will."

It is argued that the testator's friendship for the plaintiff, as evidenced in many ways and particularly by the intended gift of 1,000 shares in the 1901 will, could not have so materially altered in 1914 as to go the length of leaving the plaintiff nothing. At the outset there is this outstanding fact, that the plaintiff was not related to or in any way connected with the testator, and not only knew nothing of the contents of the 1901 will, but never contemplated the possibility of any such gift. When he learned of Edward Walker's death he accepted the situation without a murmur and without any inquiry as to what the testator might have intended for him when their friendship and business relations were closer.

Now, it may well be that the testator's intention by the legacy in the 1901 will was to reward the plaintiff for his services to the company. When, later, the plaintiff received the bonus of 750 shares from the company itself and had his salary augmented and then had completely severed his business relationship with the company and the Walker brothers, it would have been surprising if the testator had not altered his previous intention and revoked the gift. It is evident, from certain statements in the plaintiff's letters to Mr.

Lash during the summer of 1912, that even the testator, who had undoubtedly been more friendly and intimate with the plaintiff than either of the other brothers, was becoming a little irritated by the plaintiff's insistent demands for additional remuneration. The plaintiff's demand that they should buy back his shares at \$300 per share may well have come as a shock to the testator, and have brought home to him not only the extent of his previously intended gift of 1,000 shares, but the danger of placing so large a number of shares in the hands of a man who might use them to the detriment of other members of the company. Is it not clear from this correspondence that the plaintiff's influence with the Walker brothers was waning and that the current of his life was rapidly drifting away from theirs, even from that of the testator, who, theretofore, had been one of his greatest friends? Rather than maintain his relationship upon the footing then existing, the plaintiff chose to sever his connection with his employers and his erstwhile friends. In his letter to the testator of the 16th August, 1912, the plaintiff speaks of being driven to some course which may cause the testator discomfort—a plain intimation that, unless his demands were acceded to, he would not hesitate to sacrifice even the testator's friendship. What possible reason could now exist for making so large a gift to one who had been rewarded so handsomely by the company, and who as a result of all this friction had left its employ? One cannot help thinking that failure to revoke the earlier legacy would itself have indicated imbecility on the part of the testator.

The plaintiff clearly fails upon the first of his grounds for the reversal of the judgment.

As to the second ground, not much need be said that is not covered by what I have dwelt upon already. The plaintiff has failed to shew such suspicious circumstances as would justify the Court in holding that the will should not be sustained. The judgment of the Appellate Division in *Larocque v. Landry*, 52 O.L.R. 479, that after probate has been granted, even in common form, mere suspicious circumstances surrounding the execution of the will are not sufficient, when the will is attacked in the Supreme Court, to shift the onus of establishing the validity of the will to the executors, is binding upon us. Apart from the evidence of the physicians called by the plaintiff, it is difficult to see just what there was about the drawing and execution of the will to arouse any suspicion whatever.

In the alternative the plaintiff asks for a new trial upon the three grounds set forth above.

App. Div.

1925.

ROBINS
v.

NATIONAL
TRUST Co.

Orde, J.A.

App. Div.

1925.

ROBINS

v.

NATIONAL
TRUST CO.

Orde, J.A.

The first ground is that the learned trial Judge improperly allowed more than three expert witnesses to be called for the defence. Section 10 of the Evidence Act limits the number of "persons entitled, according to the law or practice, to give opinion evidence," who may be examined as witnesses on either side, to three. There has not been much judicial exposition of the exact scope of this provision. In *Rice v. Sockett*, 27 O.L.R. 410, a Divisional Court directed a new trial because six witnesses had been called to express an opinion about the construction of a silo. The judgment in that case indicates that the Act was intended to apply to persons who possess special or peculiar knowledge or experience as to the subject-matter upon which they are called upon to testify. That knowledge or experience may be acquired either by scientific study or practical experience. And in that case it was clear that each of the six witnesses was called to give evidence because of his special qualification to give opinion evidence upon the point in issue.

But does a man, who, for example, having seen a motor car pass, is asked how fast it was going, come within the category of those who are "entitled, according to the law or practice, to give opinion evidence?" I think not. He does not qualify for the purpose of any such opinion by first shewing what experience or training he has to enable him to testify as to the speed of the car. To bring the matter home to the present case, do the two witnesses to the execution of the will come within the category because they were asked as to the testator's mental condition when he signed the will? I cannot think so. They merely tell what they saw or failed to see. Their statements as to what they saw or failed to see are not predicated upon any peculiar knowledge or experience differing from that of mankind in general. There is, of course, a type of evidence which comes clearly within the Act, where one possessing scientific knowledge is called to express an opinion upon facts adduced in evidence and who knows nothing about the case except what he hears or is told in Court. There is another type where one specially qualified to give an opinion, but who has come into direct relationship with certain of the persons or things involved in the case, may be called to give evidence not only as to those persons or things but to draw conclusions based upon his scientific knowledge or special qualifications and to give the Court the benefit of the conclusions so formed. Cases of this type may present difficulty as to just where to draw the line between what is admissible and what the Act excludes. Then there is the type which is in question here, which, while some-

times termed "opinion evidence" is not that of persons "entitled, according to the law or practice, to give opinion evidence" as such, within the meaning of sec. 10. Suppose, for example, a man who has associated for years with another is asked whether in all that time he ever saw anything to indicate that the other was insane or incapable of making his will. Would his evidence not be admissible *quantum valeat*? See Alderson, B., in *Wright v. Tatham* (1838), 5 Cl. & F. 670, at pp. 720 *et seq.* I think the plaintiff has failed to establish that there was any infringement by the learned trial Judge of the provisions of sec. 10.

There was a subsidiary objection under this head as to the admissibility of some of the evidence of Dr. Armour; but, whether inadmissible or otherwise, there was no substantial ground shewn for the granting of a new trial because of it.

As to the admission of Mrs. Walker's evidence taken on commission. Though she was called by the plaintiff, the evidence so given was tendered by counsel for the defendant executors. Its admission was strenuously opposed by counsel for the plaintiff, upon the ground that, as Mrs. Walker had refused to answer certain questions upon the advice of counsel, and, being herself a defendant, had not come forward to give evidence, it was not proper for those defendants who tendered the evidence to seek to get the benefit of those answers which she saw fit to give without also having those answers which she saw fit to withhold. There may be some force in this objection, and it would be greater still if Mrs. Walker's counsel were tendering the evidence on her behalf. The matter may have been largely in the discretion of the trial Judge. The evidence was adduced by the plaintiff, and it is difficult to see upon what ground he can object to its admission on behalf of a defendant other than Mrs. Walker, merely because the witness whom the plaintiff chose to call failed to come up to his expectations. No substantial reason has been advanced for granting a new trial upon this ground.

The third is, that fresh evidence has been discovered since the trial which, it is suggested, may assist the plaintiff. Whatever this evidence may be, it is admittedly merely corroborative at most of evidence already given on behalf of the plaintiff. The practice is clear that a new trial cannot be granted upon that ground.

For these reasons, the appeal must be dismissed with costs.

App. Div.
1925.
ROBINS
v.
NATIONAL
TRUST Co.
Orde, J.A.

Appeal dismissed.

[APPELLATE DIVISION.]

1925.

BABBITT v. CLARKE.

April 3.

Limitation of Actions—Possessory Title to Strip of Land—Trespass—Encroachment—Enclosure—Adverse Possession—Evidence—Successive Trespassers without Interval—Absence of Express Conveyance of Strip—Character of User—Whether as Mere Way or Easement—Continuous, Uninterrupted, and Exclusive Possession for Statutory Period.

Enclosure is not a necessary element in determining whether possession of land is adverse or not—its importance rests in its evidential value.

Seddon v. Smith (1877), 36 L.T.R. 168, followed.

The plaintiff sought to establish a possessory title to a strip of land lying along the line dividing his lot (41) from the defendants' lot (40), bordering upon a city street. The strip was part of lot 40, which lay immediately to the east of lot 41. The strip did not commence at the street-line, but at a point on the dividing line some distance back. From that point a hedge ran in a curving line upon lot 40 to a point near the rear of the two lots. Upon that part of lot 40 between the hedge and the dividing line was also a part of the sidewalk by which access was had from the street to the entrance and rear doors of the plaintiff's house, and upon the strip was also part of the plaintiff's lawn:—

Held, that the continuous use of the strip as part of the cultivated lawn might alone be sufficient evidence of adverse possession; but the hedge, though not continued to the rear of the lot, in fact (owing to the conformation of the ground) marked the eastern boundary of the whole strip.

DeVault v. Robinson (1920), 48 O.L.R. 34, referred to.

Held, also, that, there being no interval between the possession of B., the plaintiff's predecessor in the occupation of the strip, and the possession of the plaintiff, the absence of an express conveyance of the strip by B. to the plaintiff did not give a new starting point for the statutory period.

Handley v. Archibald (1899), 30 Can. S.C.R. 130, 137, and *Robinson v. Osborne* (1912), 27 O.L.R. 248, referred to.

Held, also, that the whole of the strip was in fact occupied, used, and enjoyed by B. and the plaintiff as fully as if they were the owners of it and to the exclusion of the true owner, for a period of more than 10 years before the plaintiff's possession was disturbed.

The user of the strip by the plaintiff and his predecessor in title was not as of a way or easement only.

Griffith v. Brown (1880), 5 A.R. 303, distinguished.

It was declared that, as against the defendants, the plaintiff was the owner in fee simple of all that part of lot 40 lying to the west of the centre line of the hedge.

APPEAL by the plaintiff from the judgment of the County Court of the County of York dismissing an action brought to establish the possessory title of the plaintiff to a strip of land.

December 17 and 18, 1924. The appeal was heard by LATCHFORD, C.J., MAGEE, MIDDLETON, and ORDE, JJA.

John Jennings, K.C., for the appellant, contended that proof of enclosure was not essential to the establishing of adverse possession of the land: *Seddon v. Smith* (1877), 36 L.T.R. 168; *Steers v. Shaw* (1882), 1 O.R. 26; *Shepherdson v. McCullough* (1882), 46 U.C.R. 573, 609; *Norton v. London and North Western Railway Co.* (1879), 13 Ch. D. 268, at p. 274. The hedge spoken of in the evidence was not in fact a boundary—when it was put up it was a trespass—and this favoured the appellant's position, for the worse it was morally the better it was legally: *Sherren v. Pearson* (1887), 14 Can. S.C.R. 581, at p. 593. The present case might be said to be on all fours with *Marshall v. Taylor*, [1895] 1 Ch. 641. Reference to *Robinson v. Osborne* (1912), 27 O.L.R. 248.

H. S. White, K.C., and *C. V. Farmer*, for the defendants, respondents, contended that the only user by the plaintiff of the land in question had been as a way, and it would have required 20 years to secure title to such an easement by prescription. The appellant had failed to satisfy the onus upon him to prove continuous, uninterrupted, and exclusive possession for a period of 10 years, and this was a complete bar to his success: *Robinson v. Osborne*, 27 O.L.R. 248, 8 D.L.R. 1014, annotation at p. 1021; *Harris v. Mudie* (1882), 7 A.R. 414, 420; *Wright v. Olmstead* (1911), 3 O.W.N. 434, 435; *McGregor v. Keiller* (1883), 9 O.R. 677; *Davis v. Henderson* (1869), 29 U.C.R. 344; *Huffman v. Rush* (1904), 7 O.L.R. 346, 349; *Kay v. Wilson* (1877), 2 A.R. 133, 136; *McConaghy v. Denmark* (1880), 4 Can. S.C.R. 609, 632; *Campeau v. May* (1911), 2 O.W.N. 1420. There must be clear and unequivocal proof before the appellant can be given a certificate of title to the land as against the respondents: *McIntyre v. Thompson* (1901), 1 O.L.R. 163; *Griffith v. Brown* (1880), 5 A.R. 303, 312; *Piper v. Stevenson* (1913), 28 O.L.R. 379, 387; *Marshall v. Taylor*, [1895] 1 Ch. at p. 645; *Grant v. Morton* (1924), 57 N.S.R. 300; *McLaren v. Strachan* (1891), 23 O.R. 120, note.

April 3. The judgment of the Court was read by ORDE, J.A.:—This action involves the title to a small strip of land which forms part of lot 40 on the north side of Roxborough street east, Toronto, as shewn on plan No. 528. The paper-title to lot 40 is in the defendants, but the plaintiff, who is the owner of lot 41,

App. Div.

1925.

BABBITT

v.

CLARKE.

App. Div. which lies immediately to the west of lot 40, claims title to the
1925. strip in question by virtue of the Statute of Limitations.

BABBITT
v.
CLARKE.
Orde, J.A. The land in question is a narrow strip along the line dividing the two lots. The strip does not commence at the street-line, but at a point on the dividing line some distance back. From that point a hedge runs in a curving line upon lot 40 to a point near the rear of the two lots. At the widest part, the centre of the hedge is about $5\frac{1}{2}$ feet from the dividing line.

Upon that part of lot 40 between the hedge and the dividing line is also a part of the sidewalk by which access is had from the street to the entrance and rear doors of the plaintiff's house, and upon the strip is also part of the plaintiff's lawn.

As shewn by the plan and from the evidence, the dwelling house upon the plaintiff's land stands upon high ground, there being a steep slope upwards from the street level. The top of the slope is gained by a steep stairway or series of steps, from which at the top the walk or pathway to the house curves off. The land at the back also takes a sudden drop before the rear boundary is reached, and it is at or close to the top of this declivity that the hedge ends.

The main questions for determination are two, namely: (1) Was the learned trial Judge right in holding that the plaintiff had failed to establish continuous and exclusive possession for the necessary period of ten years? And (2), even if that were established, was he right in holding that the user by the plaintiff and his predecessor in title was in the nature of a way or easement only, and so requiring 20 years to disentitle the defendants?

One or two minor questions which were argued may be disposed of in a few words. It was urged that, as the hedge at the rear did not reach the rear of lot 40 and did not curve in to the dividing line, and so left an opening into the strip from the remaining part of lot 40, there was no real enclosure. And it was also contended that, as at certain times of the year it might be possible to squeeze through the shrubs composing the hedge, the hedge did not really constitute a barrier between the strip in question and the defendants' land. There was no evidence that the defendants or their predecessors in title or any one on their behalf had at any time during the period in question actually gone upon the strip, either through the gap at the rear or through the hedge itself.

But the law is quite clear that enclosure is not a necessary element in determining whether possession is adverse or not. Its

importance rests in its evidential value. As Cockburn, C.J., says in *Seddon v. Smith*, 36 L.T.R. 168, "It makes no difference whether there be enclosure or not. Enclosure is the strongest possible evidence of adverse possession, but it is not indispensable."

Here the continuous use of the strip as part of the cultivated lawn might alone be evidence of adverse possession, without any semblance of enclosure whatever. But there was in fact a hedge which marked the eastern boundary of the whole strip. The fact that the hedge at the rear was not continued to the rear boundary or to the dividing line can in no way detract from the evidential value of its existence, especially when it terminates at the top of the declivity, which of itself practically closed the so-called gap at the end. The situation is not unlike that in *DeVault v. Robinson* (1920), 48 O.L.R. 34, where the Appellate Division held that, although there had been no gate at the street end of the alleyway there in question, the defendant's possession was none the less adverse.

Nor is the absence of an express conveyance of the strip itself by Bollard, the first trespasser, to the plaintiff, who succeeded him in occupation of the strip, sufficient to give a new starting point for the statutory period. There was no interval between the possession of Bollard and that of the plaintiff, during which possession could be referred to the real owner of the strip: *Handley v. Archibald* (1899), 30 Can. S.C.R. 130, at p. 137; *Robinson v. Osborne*, 27 O.L.R. 248.

Dealing now with the two main questions upon which the learned trial Judge has found for the defendants, it will be more convenient to dispose first of the second one, because, if the only title which the plaintiff could have acquired is an easement, then there has been no user for 20 years, and the plaintiff must fail.

Now if in the present case the only user of the land in question had been for the purpose of crossing over it to gain easier access to the Bollard dwelling house, that user could hardly be held to be other than a mere way or easement. So to use the land would not necessarily be adverse to the real or constructive possession of the true owner. And it may be that the mere laying of a plank-walk or flag-stones across another's lands would be held in the particular circumstances to be referable to the use of the land for the purpose of the way and no other.

But here, whether the encroachment upon lot 40 was due to the mere desire to gain easier access to the house or not, the character of the encroachment, and not its mere purpose, must be what

App. Div.

1925.

BABBITT

v.

CLARKE.

Orde, J.A.

App. Div.

1925.

BABBITT

v.

CLARKE.

Orde, J.A.

governs. There was not only the use of the land as a way, but the planting of the hedge in such a way as substantially to enclose the land so used, and the cultivation of a lawn upon so much of the strip as was not occupied by hedge and walk. There was in fact nothing to distinguish the use of the invaded strip from that of the adjoining part of lot 41 belonging to Bollard. The whole of the strip was in fact occupied, used, and enjoyed by Bollard and his successor, the plaintiff, as fully as if they were the owners of it, and to the undoubted exclusion of the true owner.

Griffith v. Brown, 5 A.R. 303, to which the learned trial Judge refers, is relied on by the defendants. But there it was clear that the plaintiffs' user of the stairway which they had erected upon the defendant's land had not had the effect of excluding the defendant. The platform, stairway, and landing were equally open to the defendant and the plaintiffs, and the defendant had in fact on one occasion moved the platform and occupied the ground upon which it rested for six weeks. In these circumstances the Court of Appeal held that the plaintiffs had not had such exclusive occupation for 10 years as to bar the defendant.

There is no parallel between that case and this, in my judgment. Here the character of Bollard's and the plaintiff's occupation is wholly inconsistent with any actual or constructive possession by the true owner. If that occupation continued for a period of 10 years, then the defendants are barred.

There is no evidence of any interruption in Bollard's or the plaintiff's possession upon which to fix a new starting point for the running of the statute. The sole question is, whether the plaintiff has satisfactorily established that the occupation extended over the necessary period of 10 years.

Lot 41 was purchased by Bollard in 1909, when both it and lot 40 consisted of vacant land. In 1910 he built a dwelling house upon it, and moved into it in October, 1911. And it was occupied by Bollard and his widow until September, 1919, when she as his administratrix sold and conveyed lot 41 to the plaintiff.

The only witnesses able to throw any light upon the planting of the hedge and the laying of the walk were Mrs. Bollard and her daughter Mrs. Macpherson. Mrs. Bollard swears that the hedge was planted by her husband in 1911 or 1912 and was never moved, and that the sidewalk had been laid just inside the hedge. There was no fence or other separation between the sidewalk and the land to the west, which was "clipped and cut and cultivated with flowers" as she puts it, and she says that at the rear, where the hedge

terminated, there was a bed of ferns. The hedge was fairly thick, and people might come through it by pushing it aside, but they would have some trouble in doing so. No one ever objected to their using the land within the hedge. Upon cross-examination Mrs. Bollard says she thinks the wooden walk was laid the same year they moved in, 1911. She says it was there when they moved in, as they had no other way of getting to the house.

The wooden walk was replaced by stone-flags some years later, and one of the points made by the learned trial Judge in dealing with Mrs. Bollard's evidence is that she speaks as if the stone-flags were laid while she and her husband occupied the place, while the plaintiff says that it was he who substituted the flag-stones for the wooden walk.

Mrs. Macpherson, who lived with her father and mother for a few months after they moved in 1911, and then moved to her own house a little farther to the west on lot 41, corroborated her mother upon all material points. And in one important particular their evidence is very significant. Mrs. Macpherson's little daughter died in July, 1913, and Mrs. Bollard swears that she picked some flowers from the hedge (the hedge is of a species of *spiraea*, commonly called "bridalwreath") and placed them upon the child's coffin. Mrs. Macpherson also recalls this incident. If they are correct in this, it establishes the existence of the hedge in bloom in that month, which was more than 10 years before the plaintiff's possession was disturbed by the defendants.

There is no evidence to contradict that of these two witnesses, but the learned trial Judge discredits Mrs. Bollard, who is an elderly woman, partly because of her mistake in saying, or thinking, that the flag-stones were laid during her husband's lifetime, and partly because of other discrepancies in dates as given by her. And he discredits Mrs. Macpherson's evidence upon the ground that she had been discussing the matter with her mother and relied upon her mother's memory for dates.

Now, while Mrs. Bollard and her daughter admitted having discussed the matter, there is nothing in their evidence to justify the conclusion that Mrs. Macpherson was relying upon her mother's memory for anything. After giving due force to any criticism to which Mrs. Bollard's evidence may be subject as to her memory of dates and periods of time, there can be no doubt about her desire to give the facts as she recalls them, and I can see no justification for discrediting the whole of her evidence merely because of some unimportant discrepancies. The incident with regard to

App. Div.

1925.

BABBITT

v.

CLARKE.

Orde, J.A.

App. Div.
1925.

BABBITT
v.
CLARKE.

Orde, J.A.

the death of Mrs. Macpherson's child in 1913 can hardly be a figment of the imagination, and, in my judgment, unless shewn to be untrue, conclusively established the existence of the hedge prior to July, 1913.

The learned trial Judge has given great weight to the evidence of Brown, the landscape gardener and nurseryman. Brown had no knowledge of the history of the hedge, but from an examination of some clippings from the hedge, and a view of the soil and the hedge itself, he estimated its age as about 6 years. Now the plaintiff says that the hedge was practically as fully developed when he purchased in 1919 as it was at the date of the trial, June, 1924, and it is impossible to believe that Brown's estimate of 6 years can be correct, if what the plaintiff says is true.

The learned trial Judge says nothing about the evidence of Speight, the surveyor who made the survey in 1917 for Mr. Macpherson of his property to the west of the Bollard property. The plan he then made is put in, and some point was made upon the argument before us of his statement that he thinks if he had noticed the hedge in 1917 he would have shewn it upon the plan. But why? He admits he was only concerned in making a survey of the Macpherson land, and it is clear that in shewing the boundaries of the Bollard property he was concerned only with the corner-stake and its relation to the Macpherson lands. Having regard to the contour of the ground and the steep slope at the front and rear of lots 40 and 41, there would really be nothing, unless he laid a course from one stake to the other along the dividing line, to indicate to the eye that the hedge was off the line at all. It must not be overlooked that the dividing line does not run at right angles to Roxborough street, and that it would be physically impossible, standing upon the street, to know the true course of the boundary. This fact was doubtless the reason for Bollard's encroachment upon lot 40. It is also to be noted that Speight's plan does not shew Bollard's steps or walk, which were undoubtedly there in 1917. There is no point, in my opinion, in the absence from Speight's 1917 plan of any indication of the hedge.

In the face of the evidence of Mrs. Bollard and of Mrs. Macpherson, I am unable to agree with the learned trial Judge in attaching to Brown's evidence the weight he does. I think the evidence establishes satisfactorily that from a date prior to July, 1913, there was a continuous, uninterrupted, and exclusive possession, by Bollard and his administratrix and by the plaintiff, adverse to that of the defendants and their predecessors in title,

down to the month of October, 1923, when the defendants interfered with the plaintiff's occupation by entering and removing part of the hedge and flag-stones. I think the evidence carries the possession back as early as 1911, but I mention July, 1913, because of the evidence as to the funeral of Mrs. Macpherson's daughter.

For these reasons, I am of the opinion that the appeal should be allowed and that it should be declared that the plaintiff is the owner in fee simple as against the defendants of all that part of lot 40 lying to the west of the centre line of the hedge. It is obviously impossible, upon the evidence, to determine how much, if any, of this land east of that centre, had been occupied for a period of 10 years; and as to the overhanging branches upon the easterly side, the encroachment would probably be in the nature of an easement and so requiring 20 years to ripen into a title.

The plaintiff should have his costs both here and below.

Appeal allowed.

[APPELLATE DIVISION.]

RE HEATH AND ROSE.

Mines and Mining—Recorded Claim—Certificate of Record—Work Performed—False Affidavit—Restaking by Disputant—"Dispute"—Finality of Certificate—Remedy by Appeal Lost by Delay—Mining Act of Ontario, secs. 63 (4), 133.

Subsection 4 of sec. 63 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, provides that a "dispute" shall not be received or entered against any claim after a certificate thereof has been granted:—

Held, that once a certificate of record is issued to a licensee it should not be open to question in any way not provided by the Act.

Proceedings instituted by H. under sec. 63 were improper and might be treated as a nullity.

A certificate of record issued by a Recorder to R., however fraudulently obtained, must stand unless open to attack in some other way. The right to an appeal under sec. 133 was lost by delay.

Sections 63, 64, 65, 66, 84, and 133 of the Act considered.

An appeal by Heath, under sec. 151 of the Mining Act of Ontario, R.S.O. 1914, ch. 32, and a cross-appeal by Rose from the judgment of T. E. Godson, K.C., Mining Commissioner for Ontario, dated the 28th November, 1924, in a proceeding on a "dispute" filed by a licensee under sec. 63 of the Act.

The learned Commissioner dismissed the dispute, amended the certificate of performance of mining conditions, and extended the time for the performance of work that had not in fact been performed, though sworn to at Rose's instance, by his agent, one Stuart.

App. Div.

1925.

BABBITT

v.

CLARKE.

Orde, J.A.

1925.

April 3.

App. Div. February 5. The appeal was heard by LATCHFORD, C.J.,
1925. MIDDLETON, J.A., LOGIE, J., and ORDE, J.A.
RE HEATH W. A. *Gordon*, for Heath.
AND ROSE. J. A. *McEvoy*, for Rose.

April 3. The judgment of the Court was read by LATCHFORD, C.J.:—Many grounds for the appeal and cross-appeal are alleged. However, in the view which I take of the proceedings before the Commissioner, it is necessary to consider but one, urged by counsel for Rose, that a certificate of record of the claim which he obtained from the Recorder is a complete bar to a dispute under sec. 63 of the Act.

The property in question is an irregular fraction, said to be about 400 feet in length and of a width of but from 10 to 25 feet. It lies in the village of Kirkland Lake, between the properties of the Wright-Hargreaves and the Sylvanite Mining Companies. The claimant Heath represents these companies, which have interests in common, and the property is regarded as of much value to them. Except to these companies, or to one of them, the fraction cannot be of any value as a mining location.

It appears from the abstract of the Recorder of the Larder Lake Mining Division that the fraction was staked out on the 10th August, 1922, and recorded on the 15th and 21st August, 1922. The claim was transferred to Rose on the 11th August, 1924. A certificate of record under sec. 64 of the Act was granted to him on the 13th August, 1924. Such a certificate is, by sec. 65, final and conclusive evidence of the performance of all the requirements of the Act except working conditions. When issued in mistake or obtained by fraud, it may, under sec. 66, be revoked or cancelled "on the application of the Crown . . . or of any person interested."

Thirty days' work had to be performed by the 21st August, 1924. On the 22nd, he filed a report of $90\frac{3}{4}$ days' work, as attested by Stuart, and obtained a certificate that work to that extent had been performed. The Commissioner found that only $16\frac{1}{2}$ days' work had been done.

Heath staked out the claim on the 26th, on the assumption that it was open under sec. 84 (c) of the Act, the prescribed work not having been duly performed, and the certificate of work procured by false representations. He then applied for record. As Rose had obtained both a certificate of record and a certificate of performance of working conditions, Heath's application was refused. He then filed a "dispute" under sec. 63.

On the opening of the matter before the Commissioner, counsel for Rose objected that, as Rose had obtained a certificate of record, the proceeding was irregular, and that Heath's only remedy was to have applied by way of an appeal under sec. 133. He cited subsec. 4 of sec. 63, which, so far as applicable to this case, provides that "a dispute shall not be received or entered against any claim after a certificate of record thereof has been granted."*

App. Div.
1925.
—
RE HEATH
AND ROSE.
—
Litchford,
C.J.

* The following are the material portions of the sections of the Act referred to:—

63.—(1) A dispute, Form 8, verified by affidavit, Form 9, may be filed with the Recorder by a licensee alleging that any recorded claim is illegal or invalid in whole or in part, and if the disputant or the licensee in whose behalf he is acting claims to be entitled to be recorded for or to be entitled to any right or interest in the lands or mining rights, or in any part thereof comprised in the disputed claim, the dispute shall so state, giving particulars; and the Recorder shall, upon payment of the prescribed fee, receive and file such dispute, and shall enter a note thereof upon the record of the disputed claim.

(4) A dispute shall not be received or entered against any claim after a certificate of record thereof has been granted, nor except by leave of the Commissioner after the validity of the claim has been adjudicated upon by the Recorder or by the Commissioner, or after it has been on record for sixty days and has already had a dispute entered against it; but this amendment is not retroactive and shall not apply to any case where such validity has heretofore been adjudicated upon by the Recorder or by the Commissioner.

64.—(1) When a mining claim not in a special mining division has been recorded for sixty days the Recorder shall, upon application of the holder of the claim, give a certificate of record, Form 10, provided that there is no dispute standing against the claim, and the surface rights compensation, if any, has been paid or secured, and unless by reason of an order, pending proceeding or other special matter or thing, it would be improper to give such certificate. (As amended by the Mining Amendment Act, 1922, 12 & 13 Geo. V. ch. 22, sec. 15).

65. The certificate of record, in the absence of mistake or fraud, shall be final and conclusive evidence of the performance of all the requirements of this Act, except working conditions, in respect to the mining claim up to the date of the certificate; and thereafter the mining claim shall not in the absence of mistake or fraud be liable to impeachment or forfeiture except as expressly provided by this Act.

66. Where the certificate of record has been issued in mistake or has been obtained by fraud, the Commissioner shall have power to revoke and cancel it on the application of the Crown or an officer of the Bureau of Mines, or of any person interested.

84.—(1) Except as provided by section 85, all the interest of the holder of a mining claim before the patent thereof has issued shall without any declaration, entry or act on the part of the Crown or by any officer, cease and the claim shall forthwith be open for prospecting and staking out,

(c) If the prescribed work is not duly performed.

133.—(1) A person affected by the decision of, or by any act or thing, whether ministerial or judicial, done, or refused or neglected to be done by the Recorder, may appeal to the Commissioner, who shall decide the matter and make such order in the premises as he may deem just.

App. Div.

1925.

RE HEATH
AND ROSE.Latchford,
C.J.

Notwithstanding the prohibition so expressed, the Commissioner proceeded with the appeal. I cannot but think he should not have done so. Stability of title is essential to the success of the great mining industry, and once a certificate of record is issued to a licensee it should not be open to question in any way not provided by the Act. The proceedings instituted by Heath under sec. 63 were, in my opinion, improper, and may be treated as a nullity. The certificate of record issued by the Recorder to Rose, however fraudulently obtained, must stand unless open to attack in some other way. So much time elapsed before the matter was brought to the attention of the Commissioner that the right to an appeal from the Recorder, under sec. 133, appears to have been lost and Heath left without recourse.

Other reasons might be stated why both appeal and cross-appeal fail, but the violation of subsec. 4 of sec. 63 is sufficient.

There should be no order as to costs.

Appeal and cross-appeal dismissed.

[APPELLATE DIVISION.]

1925.

HOLDAWAY V. BRITISH CROWN ASSURANCE CORPORATION LTD.

April 3.

Insurance (Automobile) — Application Signed by Agent of Insurance Company without Written Authority of Assured — Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 198d(1) (12 & 13 Geo. V. ch. 61, sec. 14) — Non-compliance with — Policy Issued Relied on by Assured and Insurer — Disregard of Prohibition — Misrepresentations in Policy — Materiality — Sec. 155 of Principal Act — Contract Vitiating by Fraud.

The judgment of WRIGHT, J., 56 O.L.R. 235, was reversed.

Held, that the misrepresentations as to the model year of the insured auto-truck, as to cost, and as to a previous fire, were material in fact.

Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. (1924), 41 Times L.R. 183, [1925] A.C. 314, applied in regard to the test of materiality.

The policy was issued contrary to the provisions of sec. 198d(1) of the Ontario Insurance Act, as enacted by the amending Act of 1922, 12 & 13 Geo. V. ch. 61, sec. 14, which appeared to be enacted for the protection of both the insurer and the assured; but, as both parties chose not to rely on the prohibition which it contains, it should be wholly disregarded, and the matters in issue should be determined on the provisions of the policy, which was expressed to have been issued "in consideration of the premiums herein provided and of the statements forming part hereof." The material misrepresentations of

the plaintiff, recited in the policy, were therefore fatal to his claim upon it.

Per HODGINS, J.A.:—Section 155 of the principal Act, R.S.O. 1914, ch. 183, provides that the handing over of a policy of insurance in Ontario shall be deemed to have evidenced a contract made therein, and the contract thus made might be one which totally failed to satisfy the provisions of sec. 198*d*.

The facts of this case brought it well within the principle of *Dworkin v. Globe Indemnity Co. of Canada* (1921), 51 O.L.R. 159; and, quite apart from any defence based on the terms of the policy, the contract was vitiated by fraud.

1925.

HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

APPEAL by the defendants from the judgment of WRIGHT, J., 56 O.L.R. 235.

March 4. The appeal was heard by LATCHFORD, C.J., HODGINS, MIDDLETON, and ORDE, J.J.A.

F. J. Hughes, for the appellants, contended that, upon the evidence, they should be relieved from liability under the policy. The thing described was never insured: *Brock v. United States Fidelity and Guaranty Co.* (1921), 20 O.W.N. 278; *Biggar v. Rock Life Assurance Co.*, [1902] 1 K.B. 516, 524; *Provident Savings Life Assurance Society of New York v. Mowat* (1902), 32 Can. S.C.R. 147; *Battle v. Fidelity and Casualty Co. of New York* (1923), 54 O.L.R. 24. The plaintiff had acquiesced in the incorrect statements made by the agent in the proposal: the *Mowat* case (*supra*); the *Battle* case, at p. 35. The application could not be repudiated without avoiding the contract, under the express provisions of sec. 198*d* (1) of the Ontario Insurance Act, R.S.O. 1914, ch. 183, as enacted by the amending Act of 1922, 12 & 13 Geo. V. ch. 61, sec. 14, re-enacted, in substantially the same words, in the Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, sec. 165 (1). Reference to *Dworkin v. Globe Indemnity Co. of Canada* (1921), 51 O.L.R. 159; *Moffa v. Law Union and Rock Insurance Co.* (1924), 26 O.W.N. 88; *Ross v. Scottish Union and National Insurance Co.* (1918), 58 Can. S.C.R. 169; *Simpson on Automobile Insurance* (1921), p. 55, referring to *Reed v. St. Paul Fire and Marine Insurance Co.* (1915), 165 N.Y. App. Div. 660, 151 N.Y. Supp. 274; *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Re Yager and Guardian Assurance Co.* (1912), 108 L.T.R. 38; *Western Assurance Co. v. Harrison* (1903), 33 Can. S.C.R. 473; *Moore v. Citizens Fire Insurance Co.* (1888), 14 A.R. 582; *Strong v. Crown Fire Insurance Co.* (1913), 29 O.L.R. 33.

A. Clark, for the plaintiff, respondent, argued that it was the duty of the agent to ask the questions and fill in the answers to them in the proposal: *Welford and Otter-Barry on Fire Insurance*,

App. Div. 2nd ed., p. 158. Reference to *In re Universal Non-Tariff Fire Insurance Co.* (1875), L.R. 19 Eq. 485; *Rockmaker v. Motor Union Insurance Co. Ltd.* (1922), 52 O.L.R. 553; *Coulter v. Equity Fire Insurance Co.* (1904), 9 O.L.R. 35, 42; *Dowdy v. General Animals Insurance Co.* (1915), 33 O.L.R. 258; Huddy on Automobiles, 5th ed., p. 1023, sec. 804; *Fidelity and Casualty Insurance Co. v. Mitchell* (1917), 36 D.L.R. 477 (P.C.); *Desmarais v. London Guarantee and Accident Co.* (1919), 25 Rev. Leg. N.S. (Quebec) 301; *Patterson v. Oxford Farmers' Mutual Fire Insurance Co.* (1912), 7 D.L.R. 369; *Anglo-American Fire Insurance Co. v. Hendry* (1913), 48 Can. S.C.R. 577; *Mechanic v. General Accident Assurance Co. Ltd.* (1924), 26 O.W.N. 185.

1925.
HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

April 3. LATCHFORD, C.J.:—This is an appeal from the judgment of Wright, J. (1925), 56 O.L.R. 235, awarding the plaintiff \$3,000, with interest and costs, upon a policy of insurance issued by the defendant company on the 8th March, 1924, on a six-ton Packard truck, destroyed by fire about 2 a.m. on the 13th May, 1924. The truck at the time had not been in use for more than a week or two, and was in a small wooden garage on the plaintiff's premises near his residence. The cause of the fire, which appears to have burned nothing more than the truck and garage, was stated to be unknown. In the claim made on the insurers, the serial number of the truck was correctly stated as 124484. The year, meaning the model year of the truck, was stated to be 1921. The price paid by the plaintiff for the truck was said to be \$6,900.

The insurers refusing to pay, the plaintiff brought action. In the statement of claim, his ownership of the truck, its destruction, and that it was insured by the defendants, are set forth, and \$3,000 claimed.

The grounds of defence are stated by the learned trial Judge to be as follows:—

(a) That the motor truck was represented as a 1921 model, whereas in fact it was a 1917 model.

(b) That the actual cost to the plaintiff of the said motor truck was represented at \$7,000, whereas in fact the purchase-price was \$5,900.

(c) That the plaintiff was not the owner of the truck, as there was a lien-note against it for unpaid purchase-money.

(d) That the plaintiff had represented that no other company had cancelled or declined to renew or issue automobile insurance to him, whereas in fact another company had declined to issue a policy (to him) on the truck in question.

(e) That the plaintiff had in his application stated that no claim had been made against or by him for any accidental damage or other loss in respect of the ownership or operation of any automobile, whereas in fact a claim had been made against him by the Canadian Pacific Railway Company for damages done by an automobile belonging to the plaintiff to gates of the railway company at a crossing, and that the plaintiff had also collected from the London Guarantee and Accident Company Limited the sum of \$700 for loss and damage by fire to an automobile belonging to the plaintiff.

Other grounds of defence were: that the representations were false, wilful, material to the contract, and made with intent to defraud; that they were relied on by the defendants; and that the policy thus induced by the representations was void and of no effect.

The reasons for the judgment in favour of the plaintiff are, in brief: that the application for the policy was not signed by the plaintiff but by one Bragg, acting throughout not as agent for the plaintiff but as agent for the defendants; that no instructions were given to the agent to make an application in 1924, nor to make any of the statements or representations contained in the application; that, as sec. 198*d*, subsecs. 1 and 2, of the Ontario Insurance Act, as enacted by sec. 14 of the Ontario Insurance Amendment Act, 1922, 12 & 13 Geo. V. ch. 61, was not complied with, the matter had to be dealt with as if no written application had been made, and the questions to be determined were how far the statements contained on the face of the policy were binding on the plaintiff; that the plaintiff had the policy in his possession for only a very short time before the fire, and was not aware of the conditions which appeared on its face; that no misrepresentations were made by the plaintiff or by any one authorised by him which induced the defendants to issue the policy; that the policy does not comply with the provisions of sec. 156 (5) of the Ontario Insurance Act, as amended by sec. 19 of 5 Geo. V. ch. 20; and that statutory condition No. 1 appears to furnish a complete answer to the contentions of the defendants, the evidence being thought to fall very short of establishing any fraud on the plaintiff's part.

While, in the view taken by the trial Judge, it was thought unnecessary to deal with the question of the materiality of the statements or misrepresentations alleged to have been made by or on behalf of the defendants, his Lordship added that it had not been satisfactorily proved that the truck was a 1917 model. He also found "that the plaintiff had acted in good faith throughout

App. Div.

1925.

HOLDAWAY

v.

BRITISH
CROWN
ASSURANCE
CORPORATION LTD.Litchford,
C.J.

App. Div.
1925.
HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.
Latchford,
C.J.

and that he did not knowingly misrepresent or conceal any fact or circumstance required by the application. True, he did not disclose the claim by the Canadian Pacific Railway Company nor the claim against the other insurance company, but his attention was not particularly directed to these matters, and his answers were not intentionally misleading."

Mr. Hughes based his appeal on the grounds that Bragg in making the application for the policy was the agent of the plaintiff; that the plaintiff had represented to Bragg that the truck was a 1921 model, when in fact it was known to him to be and he had acknowledged it in writing to be a 1917 model; that the plaintiff had represented to Bragg that he had paid \$6,900 for it, when in fact he had paid but \$5,900; that he had represented to Bragg that he had not applied for and been refused insurance on the truck by another insurance company; and that he had made no claim for any previous loss by fire of an automobile.

These representations, it was argued, were and each of them was false to the plaintiff's knowledge and were made for the purpose of inducing and did induce the contract, which otherwise would not have been made. They were part of the consideration for the policy, expressed on its face, and, being material, vitiated the policy.

With great respect for the learned trial Judge, I am of the opinion, upon consideration of the facts and the law, that the appeal should be allowed.

The plaintiff purchased the truck in October, 1921, from one Orr, a dealer in Chatham, trading as "American Motor Sales." It was, he said, "a second-hand truck that had been rebuilt," and he swore that he was led by Orr to believe it to be a Packard model of 1920 or 1921. The purchase-price agreed upon was \$5,900, not \$6,900. Another term agreed upon was that the purchaser should fully insure the truck.

A copy of the agreement between the plaintiff and Orr was, by consent of counsel, substituted at the trial for the original, and is in evidence. The attention of the plaintiff having been called to the price mentioned in it, \$5,900, payable \$1,800 in cash and \$700 on the 15th February, 1922, and the balance of \$3,400 in instalments, he admitted the price and terms to be correct.

The importance of the misrepresentation as to price was realised by Holdaway or his counsel, and when the plaintiff was called in reply an effort was made to shew that the cost was \$6,900.

Mr. Clark asked the plaintiff on re-examination, "What did you pay for this car?" Mr. Agar, of counsel for the defendants,

objected that what he had paid had been all brought out, as it had been, on cross-examination.

"His Lordship: It does not matter about cross-examination; you cannot shut off a reply in that way; if it was brought out in the examination in chief it is a different matter.

"Mr. Agar: The lien-note was filed, shewing the price of the truck.

"Mr. Clark: They have introduced evidence——.

"His Lordship: Is there any doubt about it costing \$5,900?

"Mr. Clark: It cost more than that, my Lord.

"His Lordship: That included what?

"Mr. Clark: We paid in American funds \$5,900; the agreement says \$5,900.

"His Lordship: I will allow that.

"Mr. Clark: What did you pay for the car? A. The car cost me \$3,900."

The "\$3,900" is manifestly an error. From Mr. Agar's cross-examination on the point it clearly appears that what he said was \$6,900.

[The learned Chief Justice then quoted from the evidence of the plaintiff upon cross-examination.]

I have quoted the evidence at length owing to the light it casts on the credibility properly attributable to the plaintiff's evidence. In swearing that he paid \$6,900 for the truck he was manifestly swearing to what he knew to be false, and swearing to it for the purpose of supporting a statement appearing in more than one of the applications which he, or some one acting for him, made for insurance on the truck.

As the trial Judge found "that the plaintiff acted throughout in good faith and did not knowingly misrepresent or conceal any fact or circumstance required by the application for insurance," another example of the plaintiff's evidence may be noted.

[The learned Chief Justice quoted from the evidence of the plaintiff upon cross-examination a passage in which he admitted that he or, as he said, his son, had a McLaughlin automobile which was destroyed by fire and upon which he collected \$700 insurance money from the London Guarantee and Accident Company in May, 1922, and that he did not advise the defendants' agent (Bragg) of the fire which destroyed that automobile.]

The suppression of information regarding the burning of this car, when the policy in question in this action was procured, was, upon undisputed evidence, material to the risk on the truck undertaken by the defendants.

App. Div.

1925.

HOLDAWAY
v.

BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

Latchford,
C.J.

App. Div.
1925.
HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.
Litchford,
C.J.

Reverting to the evidence, the plaintiff deposed that the truck was delivered to him in November. As the owner of a motor vehicle he was obliged by the provisions of the Motor Vehicles Act to pay a fee and obtain a license. According to Bertram F. Brown, of Chatham, an issuer of such licenses, the plaintiff, on the 2nd November, 1921, appeared before him, applied for registration, permit and markers, and made a statutory declaration in the form prescribed by departmental regulations. This document is in evidence. It purports to have been signed by Holdaway and to have been declared before Brown. The date of the application and declaration is the 2nd November. The delivery spoken of as having been made in November must have been on the 2nd or 1st, if the plaintiff is the person who applied for registration. In any case the application was necessarily on his behalf and for his benefit.

The original declaration was exhibited to the plaintiff, and he was asked by counsel for the defendants:—

“Q. Did you make that application? A. I did not.

“Q. Who made it for you? A. I don’t know. We bought the truck, the license was on the truck when we bought it.

“Q. Mr. Brown instructs me that you brought down to him this particular application all filled out and signed, and that he said to you, ‘Is that your signature, Mr. Holdaway,’ and you said ‘yes,’ and that he then said, ‘Do you declare the contents of this to be true?’ and you said, ‘yes,’ and that he then signed the document, and that he issued the markers; what do you say as to that? A. Never signed no papers for truck the first year the license was on the truck, and they drove it to my farm and put it to work.

“Q. I asked you whether or not it was true what I was instructed Mr. Brown would say? A. I say I did not sign any application for any truck license the first year I bought it.

“Q. Mr. Brown instructs me that on or about the 2nd day of November, 1921, you brought in to him this particular application all filled out, with the name ‘Thomas Holdaway’ appearing thereon?

“His Lordship: Is that the original?

“Mr. Agar: Yes.

“His Lordship: Ask him if it is his signature.

“Mr. Agar: Is that your signature? A. That is not my writing.

“Q. That is not your signature? A. No, sir.”

The plaintiff had owned other motor vehicles, as well as the McLaughlin automobile referred to, and must, like other owners, have previously applied for registration, permit, and markers.

If not the plaintiff, some one on his behalf and personating him, applied on the 2nd November, 1921, to Mr. Brown for the registration of the plaintiff as owner of a commercial vehicle of the same trade name, a Packard truck, and of the same serial number as that purchased by the plaintiff from Orr—124484. The date of purchase is stated to be the 1st November, 1921—the vendor “American Motor Sales.” The name of the plaintiff, his county, business and residence address, “Box 145 Blenheim,” are given, also the municipality in which he resides and other particulars. One of these is “Manufacturer’s Catalogue Model E, year 1917.”

In a part of the form reserved to be filled by the issuer, the registration No. C-19838 is given, and over Mr. Brown’s initials appears an acknowledgment that a fee of \$37.50 had been paid.

If the plaintiff is to be believed, all this, though necessary under the statute, was done not by him but by some one whom he did not know, who was willing to personate him, make a false declaration of ownership, furnish a number of particulars so intimate that they could not well be known to any one but the plaintiff, and all true with one exception, and further pay \$37.50 for the plaintiff’s benefit. The exception, which is of importance, is the statement that the truck was a 1917 model.

Repudiation by the plaintiff of a written document did not stop there.

On a verbal application and on information furnished by the plaintiff, stating correctly the serial number of the truck, but incorrectly or falsely that its cost to him was \$7,500, and that it was not subject to any lien, Mr. Harry C. Keller, of Chatham, issued a policy of insurance on the truck in the St. Paul Fire and Marine Insurance Company. The truck had in fact cost the plaintiff not \$7,500, but only \$5,900, and was at the time subject to a registered vendor’s lien amounting to \$4,100.

Referring to this application and policy, Mr. Agar inquired of the plaintiff:—

“Q. Would you be surprised to know that on the 8th February, 1922, you applied to Mr. Keller for insurance on this truck, and that on the 25th February, about three weeks later, the company cancelled the insurance, and the policy was returned, and that the policy was secured back from you in order to have it can-

App. Div.
1925.

HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

Latchford,
C.J.

App. Div.
1925.

HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

Latchford,
O.J.

celled; would you deny that? A. I don't ever remember of having any policy from those people.

"Q. Is it true that Mr. Keller did inform you that he could not insure your truck with any of his companies because it had a lien against it of \$4,100? A. He told me that.

"Q. And would that be at the time that he found out from this company which had issued the policy that they could not carry it? A. He found it out some place."

Mr. Keller deposed that the insurance company, having ascertained that the truck was subject to a lien, notified him by letter of the 20th February, 1922, that it could not accept the application. Keller saw the plaintiff and read or exhibited to him, about the 25th February, the letter refusing the insurance.

On his examination for discovery, as put in at the trial, Holdaway swore in the most positive manner that he had not applied for this insurance, and that the first application for insurance on the truck was made to Mr. Bragg, the agent of the defendant company at Chatham.

As appears by a carbon copy of a report made by Bragg to the defendant on the 27th February, 1922, or within two days of the receipt of information of the declined or cancelled risk, the plaintiff applied to Bragg for a fire insurance policy for \$5,000 on the same truck. Bragg has no distinct recollection of the conversation; but, looking at the duplicate of his report, which by consent was admitted in evidence, he says the plaintiff told him the truck was a 1921 model and that it had cost him \$7,700. He does not think he asked Holdaway whether there was a lien on the truck or whether insurance on it had been cancelled or refused. A blank in the report covering these circumstances was not filled.

The next application was made to Bragg, probably as soon as first policy in the defendant company expired, and a second policy issued, dated the 3rd March, 1923. The application, if in writing, is not in evidence. The amount of the risk is reduced from \$5,000 in the first policy to \$3,500 in the second. Holdaway says he did not tell Bragg that the other company had refused or cancelled insurance on the truck, he "did not know it was necessary to tell him." He shewed Bragg a copy of a publication giving the prices of Packard trucks. "For what year?" he was asked. His answer was, "The year 1921, the year we had it." The list price for that year's model was \$8,250. Asked if he told Mr. Bragg what he paid for the truck, he answered, "I don't remember that I did." On the face of the policy, which the plaintiff admits was delivered to him, the truck is referred to by its proper number.

It is stated to have been fully paid for and to have been bought by the insurer in July, 1921. The truck, while noted to be "S. H.," or second-hand, would have been almost new if purchased in July, 1921, as its model year is stated to be 1921. The price paid is not stated in the blank provided for that purpose. At the time it was in fact subject to a lien; and, while non-disclosure of a lien in the circumstances may be material, as pleaded, the defendants did not at bar rely on it as a defence.

This policy expired by lapse of time at noon of the 3rd March, 1924. Holdaway says he told Bragg to renew it. Bragg carried insurance on virtually all the plaintiff's buildings. After denying that he left it to Bragg to keep his insurance alive, he was asked:—

"I suppose you were looking to him (Bragg) to do whatever was necessary to protect your insurance?" His answer was, "Why, sure."

Bragg procured a policy on the truck on the 8th March. What happened is thus stated by the plaintiff:—

"I said 'How about the insurance on the truck?' and I think that Mr. Bragg said to me, 'It is just out,' when he looked it up; he said I should have watched that closer; I think it was out a few days, and he put it on. He said, 'Well, I will fix it up,' and I threw him down four ten-dollar bills, and walked out. I was in a hurry, and I said I would be back.

Q. Did you tell him to continue the insurance on the truck?
A. Why, yes.

Q. The amount of the insurance is different in each policy; how did that happen? A. It happened on the decrease in the value of the truck, which your agent claimed was a decrease in the value of the truck.

"His Lordship: That is a universal rule in automobile insurance, is it not?

"Mr. Agar: Yes.

Q. You knew each year the amount of the policy was being decreased? A. Yes."

The significance of this admission is that the plaintiff was aware of the practice of insurance companies, established by ample evidence, to diminish in each successive year of an automobile's existence the amount of the risk and to increase the rate of the premium. Thus on the plaintiff's truck, represented in March, 1922, to be a 1921 model, a risk of \$5,000 was undertaken. A year later the risk was reduced to \$3,500. In 1924 the risk on the same truck by the same insurers was further reduced to \$3,000,

App. Div.

1925.

HOLDAWAY

v.

BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

Latchford,
C.J.

App. Div.
1925.
HOLDAWAY
v.
BRITISH
CROWN
ASSURANCE
CORPORATION LTD.
Litchford,
C.J.

and the rate increased from 85 cents in 1923 to \$1.10; and \$33, instead of \$29.50, was paid by the plaintiff as the premium. Had the defendants been aware that the truck was a 1917 model, and therefore in use not two but seven years, the amount of the risk, if assumed, would, upon uncontradicted evidence, have been far less, and the premium, if accepted, far greater.

Holdaway received the policy of the 8th March within a few days of its date, and had it in his possession more than two months when the truck was destroyed. It was intended that the statements attributed to the plaintiff appearing in the policy should be certified on its face to be true and correct, under the signature of the plaintiff, but he did not sign either the policy of 1923 or that of 1924.

On the policy the model year of truck 124484 is again stated to be 1921. The "actual cost to insured," which does not appear in the policy of 1923, is stated to be \$7,000. To the questions, 'Has any company cancelled, declined to renew or issue automobile insurance to the insured?' the answer appearing is "No." To "Loss by fire?" the answer is also "No." It is to be remembered that in each of the three policies the truck was stated to be a 1921 model.

The trial Judge considered that "it was not proven satisfactorily that the truck was a 1917 model." With great respect, I cannot but think his Lordship overlooked the statement in the application for the registration of the plaintiff as owner of the truck, made soon after its purchase, that it was a 1917 model. At that time no reason can have existed in the mind of the plaintiff, or, if the plaintiff is worthy of credit on the point, of the person who professed to be the plaintiff and who acted for him, to misrepresent the model year of the truck. Why, then, was that year stated to be 1917, if such was not the fact? Is not the plaintiff's repudiation or attempted repudiation of that statement plainly based on a realisation of the importance of the fact in relation to his subsequent statements, repeated even on oath, that the truck was a 1921 model?

The evidence of Mr. Underhill, of the Packard Motor Car Company of Detroit, is that motor No. 124484 was manufactured in 1917.

"His Lordship: You could tell that 124484 is a model that was made in 1917; you know that quite apart from the books?
A. Yes, sir, within a few months of its manufacture."

Minds are differently constituted—*quot homines tot sententiae* is true, like other adages, with proper limitations. For my part,

I cannot but regard the evidence as establishing that the truck was a 1917 model. I am also convinced that from the time he bought it the plaintiff knew it was a 1917 model, not a 1921 or 1920 model, and that he knew he had paid \$5,900 for it—not \$7,500, as he stated to Keller, nor \$7,000, as he stated to Bragg, nor \$6,900, as he stated in his proof of loss, and as he swore on occasion during the trial, and in absolute disregard and contradiction of what he had sworn on his examination for discovery.

It appears to be true that he did not sign the application made for insurance on the 8th March, 1924. There is, however, a written application signed with his name by Bragg. Asked why Holdaway did not sign it, Bragg said, "because he left to go out and get the money to come back and pay the policy, and he did not come back, and when I closed at night I did not like to leave the man uncovered; we did all his business, his account was good with us, and I sent the application in to the company and the policy to Mr. Holdaway.

"Q. Had that been filled in—that was filled in after Mr. Holdaway left your office? A. No, sir; that was filled in while Mr. Holdaway was in my office.

"Q. Why did not you get him to sign it then? A. Because I did not care to renew it unless it was paid for.

"Q. You could have had him sign? A. Yes; he said he would be back after dinner—he himself said there was sickness at home and he could not get back."

Just when or how Bragg learned that Holdaway could not get back was not elicited. Upon uncontradicted evidence, his instructions from the plaintiff were "to protect him in any insurance we had, and do whatever was necessary to keep him covered." He swears he signed the application under Holdaway's authority.

Section 198*b* of the Ontario Insurance Act, as enacted in 1922, applies to automobile insurance and to any insurer carrying on the business of automobile insurance in Ontario.

Section 198*d* (1), with an exception immaterial in this case, prohibits such an insurer from effecting a contract unless the insurer has received an application therefor in writing signed by the insured, or by his agent authorised in writing signed by the insured. The authority which Bragg had to act for the plaintiff was not in writing.

The next subsection (2) requires that a copy of the application "shall be attached to and form part of the policy." The mode of attachment is not prescribed. In this case it has been by impression. In printing and in other ink, an exact copy of the ap-

App. Div.

1925.

HOLDAWAY
v.

BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

Latchford,
C.J.

App. Div.
 1925.
 HOLDAWAY
 v.
 BRITISH
 CROWN
 ASSURANCE
 CORPORATION LTD.
 Latchford,
 C.J.

plication which, according to Bragg, would have been signed by the plaintiff, had he returned as intended to Bragg's office, appears on and forms part of the policy. Subsection 2 of sec. 198*d* is thus, in my opinion, fully complied with. The application itself, however, is defective in that Bragg, while, like Ireland in *Dworkin v. Globe Indemnity Co.*, 51 O.L.R. 159, the agent of the applicant, was not an "agent authorised in writing signed by the insured."

The application, such as it was, and the policy both complied with subsec. 5, and stated in prominent type (I assume it was "ten-point") and in red ink, the warning: "If the applicant knowingly misrepresents or conceals any fact or circumstance required by this application to be made known, the contract of insurance shall be void as to the property or risk undertaken in respect of which the misrepresentation or omission is made." The policy issued in 1923 and produced by the plaintiff at the trial has the same warning expressed in the same manner.

If the insured had in fact signed the application, the case would, I think, present no difficulty whatever. The materiality of the misrepresentations is established by several witnesses. Apart from their testimony, the materiality of the misrepresentation that the truck was a 1921 model may be inferred from the fact that the risk undertaken by the defendants in March, 1922, when the truck was represented as a 1921 model, was diminished by \$1,500 when the policy was renewed in 1923, and by \$500 additional in 1924. What the amount of risk assumed in any of these years would be and what the rate of premium are matters of conjecture; but that the one would have been smaller and the other greater, if the risk was accepted at all, are conclusions that, upon the evidence of Mr. Sim and Mr. Rooke, admit of no possible doubt. Further, if the company had known of the destruction by fire of the plaintiff's McLaughlin car, it would not, according to Mr. Sim, before whom the application would come, have insured Holdaways truck for any amount whatever.

The misrepresentations as to the model year of the truck and as to cost and the previous fire were material in fact.

The test of materiality, as declared by the Judicial Committee in the recent case of *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co.* (1924), 41 Times L.R. 183, [1925] A.C. 314, is: whether, if the matters concealed or misrepresented had been duly disclosed, they would, upon a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

The present case is peculiar in this that, while sec. 198*d*(1)* of the Act as amended prohibited the defendants from issuing the policy which they did issue, the plaintiff comes into Court relying on that contract. Having regard to the prohibition, the question arises: Was the policy void or only voidable? If, by reason of the prohibition, the policy was void, the plaintiff is out of Court. It is trite law that a void contract can create no legal obligation. If the policy was voidable, it must be because one or other of the parties chooses so to regard it, and so to contend. Both plaintiff and defendants rest their respective rights on the policy, the plaintiff, however, repudiating responsibility for the statements appearing on its face, copied, as stated, from the application, representing to the company that it had been signed by the plaintiff, but, in fact, signed only by his agent not authorised in writing. The section appears to me to be enacted for the protection of both the insurer and the assured. If both choose, as in the present case, not to rely on the prohibition which it contains, it may, in my opinion, be wholly disregarded, and I can concur in the opinion, expressed in the Court below, that the matters in issue fall to be determined on the provisions of the policy itself. On that basis I arrive, however, at a different conclusion.

The policy is expressed to have been issued "in consideration of the premiums herein provided *and of the statements forming part hereof.*" The statements include "model year 1921," "Actual cost to insured, including equipment, \$7,000," "Loss by fire (of any automobile) *nil.*" Each of these statements was, upon the test applied by the Judicial Committee in the case cited, material, and each, upon the evidence, was false to the knowledge of the plaintiff. They were misrepresentations, material not merely in fact, but formed, with the premium paid, the express consideration upon which the policy issued,

The appeal should be allowed and the action dismissed with costs here and below.

MIDDLETON and ORDE, JJ.A., agreed with LATCHFORD, C.J.

HODGINS, J.A.:—I agree with the conclusion to which my Lord the Chief Justice has come, that the plaintiff should not succeed.

* "198*d*.—(1) Subject to the provisions of subsection 4 " (not material here) "an insurer shall not effect a contract of automobile insurance unless such insurer has received an application therefor in writing signed by the insured, or by his agent, authorised in writing signed by the insured."

App. Div.

1925.

HOLDAWAY
v.

BRITISH
CROWN
ASSURANCE
CORPORATION LTD.

Latchford,
C.J.

App. Div.

1925.

HOLDAWAY
v.BRITISH
CROWN
ASSURANCE
CORPORATION LTD.Hodgins,
J.A.

It was pointed out on the argument that this policy of automobile insurance issued contrary to the provisions of sec. 198*d*, as enacted in 1922, which came into force on the 1st January, 1923 (sec. 18 of the amending Act). That section provides that an insurer shall not effect a contract of automobile insurance "unless such insurer has received an application therefor in writing signed by the insured, or by his agent authorised in writing signed by the insured." No penalty is imposed for a breach of this section (see sec. 5). It is not necessary to discuss the effect of this provision because the appeal can be disposed of on other grounds.

It may be pointed out, however, that sec. 155 of the Ontario Insurance Act, R.S.O. 1914, ch. 183, provides that the handing over of a policy of insurance in Ontario shall be deemed to have evidenced a contract made therein, and this contract may be one which totally fails to satisfy the provisions of sec. 198*d*.

It is to be hoped that the proper place and meaning of the latter section, in conjunction with the rest of the Act, may be cleared up by appropriate legislation. See also sec. 156 (3).

I think the facts of this case bring it well within the principle of the *Dworkin* case, 51 O.L.R. 159, that where untrue material statements are shewn to have been made in order to induce the issue of a policy of insurance, or fraudulent suppression upon material matters is proved, resulting in the insurance contract being entered into and the policy delivered, then, quite apart from any defence based on its terms, the party responsible for such statements or omissions cannot recover upon the contract. It is vitiated by fraud.

I would allow the appeal.

Appeal allowed.

[APPELLATE DIVISION.]

1925.

DOMINION LOOSE LEAF CO. LTD. v. MANUEL.

Jan. 27.
April 3.

Costs—Scale of—Taxation—Action Brought in Supreme Court of Ontario—Claim for Injunction and Damages—Amount of Damages not Specified—Injunction Granted but no Damages—Jurisdiction of County Courts—County Courts Act, R.S.O. 1914, ch. 59, sec. 22(1) (i)—Rule 649—"Order to the Contrary" not Sought at Trial—Inquiry as to Sum or Value Involved.

In an action brought in the Supreme Court of Ontario for an injunction restraining the defendant from carrying on or being concerned in any business similar to that of the plaintiffs, in whose business he had been employed, and for damages unspecified as to amount, the Judge

before whom the action was tried granted the injunction sought, but awarded no damages. He directed that the plaintiffs' costs should be paid by the defendant, but was not asked to give and did not give any special direction as to the scale of costs:—

Held, that the plaintiffs were entitled to costs upon the Supreme Court scale.

Application of Rule 649 considered.

Where an injunction is claimed, and it is not made clearly to appear that the "subject-matter involved does not exceed in value or amount \$500" (County Courts Act, sec. 22 (1), cl. (i)), it is not established that the action could have been brought in an inferior Court.

Review of the authorities.

Bragg v. Oram (1919), 46 O.L.R. 312, explained and distinguished.

Keates v. Woodward, [1902] 1 K.B. 532, and *Stiles v. Ecclestone*, [1903] 1 K.B. 544, applied.

The ruling of the Taxing Officer that the plaintiffs' costs should be taxed on the County Court scale and that there should be a set-off in favour of the defendant, under Rule 649, was reversed; and the Court declined to remit the case to the Taxing Officer for an inquiry as to the sum or value involved in the action; because the trial Judge would probably, upon application to him, have made "an order to the contrary," so as to take the case out of the operation of the Rule, and this might be set off against any disadvantage the defendant had been at by reason of a misunderstanding of *Bragg v. Oram*.

Semble, that a trial Judge, in most instances, should ameliorate the austerity of Rule 649 by indicating what in his view should be done as to costs—thus leaving to the operation of the Rule only cases in which a plaintiff had without excuse brought in a higher court an action which should have been brought in a lower court.

AN appeal by the plaintiffs from the certificate of the Taxing Officer of his ruling that the plaintiffs' costs of the action, ordered to be paid by the defendant, should be taxed on the County Court scale with a set-off, applying Rule 649, which reads:—

"649. Where an action of the proper competence of a County Court is brought in the Supreme Court, or an action of the proper competence of a Division Court is brought in the Supreme Court, or in a County Court, and the Judge makes no order to the contrary, the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client; and so much thereof as exceeds the taxable costs of defence which would have been incurred in the County Court or Division Court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed and the amount of the verdict if it be necessary; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff."

1925.

DOMINION
LOOSE LEAF
Co. LTD.
v.
MANUEL.

1925.

DOMINION
LOOSE LEAF
CO. LTD.

v.

MANUEL.

January 23. The appeal was heard by KELLY, J., in Chambers.
P. E. F. Smily, for the plaintiffs.
E. F. Raney, for the defendant.

January 27. KELLY, J.:—This is an appeal by the plaintiffs from the certificate of the Taxing Officer, in which the whole question is whether, in taxing the costs of the action, Rule 649 should be applied.

The action was for breach by the defendant of the terms of a contract for employment with the plaintiffs, who in the action claimed unstated damages and an injunction. The defendant left the plaintiffs' employment about or soon after the middle of July, 1924; the action was begun on the 2nd August, 1924. The trial judgment awarded the plaintiffs an injunction, ordered the defendant to pay the plaintiffs' costs, and dismissed the defendant's counterclaim with costs. The claim for damages appears to have been abandoned or not pressed.

In general terms, the substance of the plaintiffs' ground of appeal is, that it was not shewn that the action was necessarily within the competence of a County Court, and that the onus was on the defendant to shew that the claim for damages was within the County Court jurisdiction.

The Taxing Officer considered himself bound by the decisions in three comparatively recent Ontario cases — *Bragg v. Oram* (1919), 46 O.L.R. 312; *Parry v. Parry* (1920), 48 O.L.R. 103; and *Village of Kemptville v. Kemptville Milling Co.* (1924), 27 O.W.N. 90.

In the *Parry* case the damages were fixed at \$5 and in the *Kemptville* case at \$1. In these the damages awarded were clearly within the jurisdiction of the lower Court. The appellants now contend that in that respect there is a distinction between these two cases and the present case, where the amount of the damages claimed was not stated, and no damages were found, and that, therefore, it cannot be said that the case was within the competence of a County Court. In support of that contention a line of cases is cited, including *Rex v. Cheshire County Court Judge*, [1921] 2 K.B. 694.

It is unnecessary to discuss these cases in view of the decision in *Bragg v. Oram*, *supra*, in which, as in the present case, the claim was for unstated damages and an injunction, and the judgment in which granted the plaintiff an injunction and ordered the defendant to pay the plaintiff's costs. The Taxing Officer was proceeding to tax the costs on the Supreme Court scale, and on an

appeal to a Judge in Chambers he was upheld. An appeal was then taken to the Appellate Division, which held that the costs should be taxed on the County Court scale and that the defendants should have the usual set-off under Rule 649. In his reasons for judgment the Chief Justice of the Common Pleas said (p. 318):—

“The plaintiff’s damages were so little in fact, if really any more than nominal, that he proved none, and took judgment for an injunction only.”

With that aspect of the matter entering into the foundation of the judgment, and in view of the decided similarity of the two cases in essential particulars, I feel bound to hold that the ruling of the Taxing Officer now objected to should be sustained.

The appeal will, therefore, be dismissed with costs.

The plaintiffs appealed from the order of KELLY, J.

March 16. The appeal was heard by LATCHFORD, C.J., MIDDLETON and ORDE, JJ.A., and FISHER, J.

L. P. Sherwood, for the appellants.

E. F. Raney, for the defendant, respondent, referred to *Stiles v. Ecclestone*, [1903] 1 K.B. 544; *Bradley v. Barber* (1899), 30 O.R. 443; *Jackson v. Hughes* (1910), 2 O.W.N. 15; *Moffatt v. Link* (1910), *ib.* 56; the County Courts Act, R.S.O. 1914, ch. 59, secs. 22(1)(b), 28; Annual Practice, 1925, pp. 2244-2250.

Sherwood, in reply, referred to *Bragg v. Oram*, 46 O.L.R. 312; *Rex v. Cheshire County Court Judge*, [1921] 2 K.B. 694; *Martin v. Bannister* (1879), 4 Q.B.D. 491; *Deverell v. Milne*, [1920] 2 Ch. 52; *Keates v. Woodward*, [1902] 1 K.B. 532; *Du Pasquier v. Cadbury Jones & Co. Ltd.*, [1903] 1 K.B. 104.

April 3. The judgment of the Court was read by MIDDLETON, J.A.:—The action was brought for an injunction restraining the defendant until the 31st May, 1925, from carrying on or being concerned or interested in any business in whole or in part similar to the business carried on by the plaintiffs, and for damages.

The action was based upon an agreement dated the 31st May, 1924, under which the defendant entered the employ of the plaintiffs, and covenanted that upon ceasing to be employed he would not, during the period ending on the 31st May, 1925, enter into the employ of any concern competing with the plaintiffs’ business, or himself be concerned in any competing business within a limited area.

On the 11th July, 1924, the defendant resigned his employment, and, it was alleged, entered the employment of a rival con-

Kelly, J.

1925.

DOMINION
LOOSE LEAF
CO. LTD.

v.

MANUEL.

App. Div.
1925.

DOMINION
LOOSE LEAF
CO. LTD.

v.

MANUEL.

Middleton,
J.A.

cern, whereupon, on the 2nd August, 1924, an action was brought for an injunction. The action was tried before Mr. Justice Lennox on the 24th October, 1924, and he granted the injunction sought, but awarded no damages. He, however, awarded the plaintiffs costs.

The plaintiffs, apparently assuming that the case was not one falling within the provisions of Rule 649, asked for no special direction, and judgment was issued accordingly.

The learned Taxing Officer, and the Judge upon appeal from him, thought that this case fell within the decision of the Divisional Court in *Bragg v. Oram*, 46 O.L.R. 312.

In that case the action was a purely personal action, in which damages were claimed for trespass, only nominal damages being proved, and an injunction was awarded restraining the repetition of the trespass. The Court took the view that in an action of that nature the County Court had jurisdiction, and that the existence of the claim for an injunction and the award of the injunction did not justify the contention that the action could not have been brought in the County Court. The decision of the Court of Appeal in England in the case of *Martin v. Bannister*, 4 Q.B.D. 491, is the foundation of that judgment. That decision was in a personal action in which damages for a nuisance and an injunction were claimed. The judgment was for £5 damages and the injunction. The holding of the Court was, as put by Lord Justice Bramwell: "There is but one cause of action for which there are two remedies: damages and an injunction. The County Court, then, has power to entertain a claim for damages and at the same time for an injunction to prevent a repetition of the injury;" or, as put by Lord Justice Brett: "One cause of action is the existence of a nuisance, another may be the apprehension or threat of a nuisance. Those are both causes of action; but it may be that when there is only a threat of a nuisance, it may not be within the jurisdiction of a County Court to grant an injunction. That point I do not decide. But here there is a clear cause of action; that cause of action is the existence of a nuisance; but it is said that on such a cause of action the County Court could not issue an injunction. As soon as it is admitted that an injunction is not a cause of action but a remedy, the power of the County Court to grant an injunction becomes clear." Substantially the same thing is said by Lord Justice Cotton.

The decision was based upon sec. 89 of the Judicature Act of 1873, which provides that an inferior court "shall, as regards all causes of action within its jurisdiction for the time being, have

power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." The corresponding provision in our Judicature Act, 1881, is now found in sec. 28 of the County Courts Act, R.S.O. 1914, ch. 59, in somewhat altered form but precisely similar substance.

App. Div.
1925.

DOMINION
LOOSE LEAF
CO. LTD.
v.
MANUEL.
Middleton,
J.A.

But these cases, it seems to me, fall far short of establishing that for which they are cited, namely, the proposition that a plaintiff who is entitled to maintain an action for an injunction, it may be involving matters of the greatest moment, can confer jurisdiction upon a County Court by merely claiming some small amount for damages sustained by reason of infringements of his rights prior to the issue of his writ. This question has also been dealt with by the Court of Appeal in England without any thought that its decision was in conflict with the decision in *Martin v. Bannister*.

In *Keates v. Woodward*, [1902] 1 K.B. 532, the claim was for damages for trespass to land and an injunction. The statute there under consideration contained no provisions similar to those found in clauses (c) and (d) of sec. 22(1) of our County Courts Act. Section 116 of the English statute under consideration differs from our Act in that it limits the defendant's right to set-off—otherwise it is substantially similar. Collins, M.R., thus states the problem (p. 535): "The question, therefore, is whether this action, in which not only nominal damages have been obtained, but, what was much more important to the plaintiff, an injunction, comes within the fair meaning of the words 'An action founded on tort,' in which less than £10 has been recovered, as used in the section. I think that it could not have been the intention of the Legislature that, where the main point of the litigation is a claim for an injunction and the subsidiary point a claim for damages, the action should be considered as coming within the meaning of the section. Could it be said that less than £10 has been recovered when, in addition to nominal damages, a right worth a thousand pounds has been secured?" After examining a number of earlier English cases, he held (p. 537) "that the section is not applicable to an action which, though nominally to recover damages for a tort, includes, as the main relief sought, a claim for an injunction. The real basis of this action was the claim of a right in respect of which an injunction was sought, and the case was, in my opinion, outside sec. 116, subsec. 2, and the plaintiff is entitled to his costs."

App. Div.
 1925.
 DOMINION
 LOOSE LEAF
 CO. LTD.
 v.
 MANUEL.
 Middleton,
 J.A.

Lord Justice Romer says (p. 537) that the statute "is primarily directed to actions for pecuniary damages for a tort. I wish to guard myself against being understood to say that a plaintiff who is substantially seeking damages can take the case out of the section by adding a colourable claim for an injunction. But when there is, besides the pecuniary claim, a substantial claim for relief of another kind, it seems to me that the section is inapplicable. To hold otherwise would produce extraordinary results. For example, take the case of a contract to pay a sum of £15 in cash and to hand over certain chattels of the value of £20. An action is brought to enforce the contract, and the plaintiff recovers judgment for £15 and an order for the handing over of the chattels. Could it be said that he had lost his claim for costs because he had recovered less than £20 in an action founded on contract?"

Mathew, L.J. (p. 539), approves of an Irish decision, to be immediately mentioned, holding that "a claim for an injunction where that is the substantial relief sought takes the case out of the rules limiting the plaintiff's right to costs."

The Irish case of *Bradley v. Archibald*, [1899] 2 I.R. 108, 110, held, baldly, that the provisions of the Rules limiting recovery of costs "have no application to a case in which the proper relief would be relief by way of injunction. . . . If the case was one in which an injunction could be granted these provisions would not apply."

The importance of the decision of the Court of Appeal in *Keates v. Woodward* is added to when it is borne in mind that the decision in the earlier case *St. John's College Cambridge v. Pierrepont* (1891), 61 L.J.Q.B. 19, is expressly overruled. It had there been held that the granting of the injunction in an action of trespass, where the damages were less than £10, did not take the case out of the rule.

In *Deverell v. Milne*, [1920] 2 Ch. 52, the principle of *Keates v. Woodward*, *supra*, was applied by Mr. Justice Sargant. The plaintiff sued for specific performance of an agreement to lease to him a house-boat, and for an injunction and damages. The defendant, after action, sublet the house-boat to another person, so that this defeated the claim for specific performance and an injunction, and the plaintiff was awarded £25 damages with costs. It was held that the plaintiff's right to costs depended upon his rights at the time of the institution of the action; and, as he then had the right to specific performance and damages, he was entitled to costs upon the High Court scale, because (p. 58) "the *ratio decidendi* in all the judgments in *Keates v. Woodward* is that the substantial claim in the action was for an injunction."

The case of *Rex v. Cheshire County Court Judge*, [1921] 2 K.B. 694, is a decision of the Court of Appeal upon a point that does not here arise, and which perhaps has no application in Ontario because of the difference of the wording of our Act with reference to the jurisdiction of County Courts, holding that, under the English Act "it is essential to the jurisdiction of the County Court in such a case that there should be a money claim not exceeding £100, and, when no such claim is made and established, the Court cannot grant ancillary relief by way of declaration or injunction." The case is, however, of value as shewing the meaning to be attributed to the expression "personal action" in the clause conferring jurisdiction upon the County Courts. It is also of value as indicating that which I think is plain enough without decision, that the section of the County Courts Act dealing with the right to grant injunctions is applicable only where there is shewn a cause of action within the jurisdiction of the County Court. I venture to quote the words of Lord Justice Scrutton as here applicable: "I cannot take the view that the section means that any question in a personal action may be raised provided you do not make a money claim in respect of it. You may be raising questions of enormous importance both as to character and ultimate business results, and I cannot think that Parliament intended such questions to be decided by an inferior Court, if any money claim was omitted from the particular plaint . . . the statute requires a quantified money claim to found jurisdiction in the County Court" ([1921] 2 K.B. at pp. 746, 747).

In *Simpson v. Crowle*, [1921] 3 K.B. 243, this decision was applied, without modification or qualification.

In *Davey v. Robinson*, [1923] 1 K.B. 563, the last case I have been able to find bearing upon this question, a claim was made for damages originally fixed at £150, but voluntarily reduced to £90 to confer jurisdiction. An injunction was claimed in the alternative. It was held that the County Court could determine the action.

I have not referred to an earlier decision, *Stiles v. Ecclestone*, [1903] 1 K.B. 544. It was there held that an action in which an injunction only is claimed can be maintained in the County Court, where the parties by agreement have fixed an amount as damages payable for breach of the covenant in respect of which the injunction is sought. A strong Court, Lord Alverstone, C.J., Wills, J., and Channell, J., agreed in upholding the jurisdiction, but guarded themselves from expressing an opinion in any case in which the parties have not by the terms of the contract assessed the amount of the damages. *Davey v. Robinson* follows this lead.

I am inclined to think that even if this case can no longer be

App. Div.

1925.

DOMINION
LOOSE LEAF
CO. LTD.v.
MANUEL.Middleton,
J.A.

App. Div.
 1925.
 DOMINION
 LOOSE LEAF
 CO. LTD.
 v.
 MANUEL.
 Middleton,
 J.A.

regarded as law in England, though it is not doubted in recent text-books, it is peculiarly applicable here, in view of clause (i) of sec. 22(1) of the County Courts Act, which gives the County Court jurisdiction in certain named equitable actions and "all other actions for equitable relief where the subject-matter involved does not exceed in value or amount \$500." This being so, I conclude that the principle laid down in *Bragg v. Oram* applies wherever it is made to appear, either by the agreement of the parties or in any other conclusive way, that the subject-matter is valued at a sum not exceeding \$500, but that it has no application to cases in which an injunction is claimed, and it is not made clearly to appear that the "subject-matter involved does not exceed in value or amount \$500." It may be that the value or amount cannot be readily shewn; but, unless and until this is shewn, it is not established that the action could have been brought in an inferior court.

It is suggested that the case be remitted to the Taxing Officer for the purpose of making inquiry as to the sum or value here involved. I do not think this should be done, as the case is one in which, had the trial Judge been appealed to, he would, in all probability, have awarded "an order to the contrary," so as to take the case out of the operation of the Rule, and this may fairly be set off against any disadvantage the defendant has been at by reason of the misunderstanding of the earlier case.

I venture to suggest that in most instances it would be better for a trial Judge to indicate what in his view should be done as to costs, and so only leave to the somewhat harsh operation of the Rule cases in which a plaintiff had without excuse brought in this Court an action that ought to have been brought in an inferior court. Justice in many cases may be done by awarding costs upon the County Court scale without set-off. The trial Judge, "as a tender nursing father," may thus ameliorate the austerity of the Rule.

The appeal should be allowed with costs here and below, and the Taxing Officer should be directed to tax the costs upon the Supreme Court scale.

Appeal allowed.

[APPELLATE DIVISION.]

1925

MACKIE v. HAMILTON BOARD OF HEALTH.

Feb. 18.

Feb. 27.

April 3.

Revivor—Action of Tort—Trustee Act, sec. 41(3)—Limitation of Time for Bringing of Action by Personal Representative—Whether Applicable to Maintenance of Action Brought before Death of Injured Person—Rule 305.

Subsection 3 of sec. 41 of the Trustee Act limits the time within which an action of tort may be "brought" by the representative of a deceased person; but the limitation does not apply to the reviving of an action brought in his lifetime by the person injured by the tort, where his death occurs *pendente lite*.

Rule 305 is the only rule or statutory provision limiting the time within which an action may be revived; and under that Rule an order to continue the action may be made at any time before the action has been dismissed.

Ardagh v. County of York (1896), 17 P.R. 184, approved.

AN appeal by the plaintiff from an order of the Master setting aside an order made on *præcipe* by the Local Registrar at Hamilton directing that this action be continued at the suit of E. A. Hunter, one of the original plaintiffs, and E. A. Hunter, administrator with the will annexed of the estate of W. L. Mackie, deceased, the other original plaintiff.

Mackie died in February, 1923; letters of administration were issued in 1925; and the *præcipe* order was made on the 15th January. The Master held that the *præcipe* order could not properly be made after the lapse of a year from the death of Mackie.

February 17. The appeal was heard by RIDDELL, J., in Chambers. *A. J. Trebilcock*, for the plaintiff.

G. H. Sedgewick, for the defendants.

February 18. RIDDELL, J.:—The action is in effect one of trespass on the case for injury to realty; and the sole question is, whether the Trustee Act, R.S.O. 1914, ch. 121, sec. 41, applies to bar the claim.

I have carefully considered Mr. Sedgewick's ingenious argument, but think the case is fully covered by *Ardagh v. County of York* (1896), 17 P.R. 184, not cited to or by the learned Master.

There are certain dicta in the cases cited and in others; but I do not think it necessary to quote or to refer to them—the one case binding upon me is sufficient to dispose of the claim.

The appeal will be allowed; costs here and before the Master to be to the plaintiff in any event.

Riddell, J. The defendants moved, under Rule 507, for leave to appeal
 1925. from the order of RIDDELL, J.

MACKIE
 v.
 HAMILTON
 BOARD OF
 HEALTH.
 February 26. The motion was heard by ORDE, J.A., in Cham-
 bers.
Sedgewick, for the defendants.
M. J. O'Connor, K.C., for the plaintiff.

February 27. ORDE, J.A.:—The action was brought by the plaintiffs, Mackie and Hunter, by a writ issued on the 25th November, 1920, for damages claimed to have been suffered by the plaintiffs by reason of the alleged wrongful act of the defendants in ordering certain houses owned by the plaintiff Mackie to be closed as insanitary. A statement of claim was delivered on the 22nd February, 1922, but for some reason the action never went on to trial.

On the 12th February, 1923, the plaintiff Mackie died, and on the 15th January, 1925 (nearly two years after his death) his co-plaintiff Hunter, who had been appointed administrator with the will annexed of Mackie's estate, took out a *præcipe* order to continue the action.

The defendants then moved before the Master of the Supreme Court to set aside that order, and the Master, on the 29th January, 1925, in a considered judgment, set it aside; but, on an appeal to my brother Riddell, the Master's order was reversed and the *præcipe* order restored. The defendants now ask for leave to appeal to the Appellate Division.

The right of the administrator to continue the action depends solely upon sec. 41 of the Trustee Act, R.S.O. 1914, ch. 121. If I were dealing with the merits of the motion before Riddell, J., it might be expedient to trace the history of this legislation, but it will suffice, I think, to refer to the judgment of Osler, J.A., in *Mason v. Town of Peterborough* (1893), 20 A.R. 683, at pp. 685-7.

It is, of course, quite clear that in a case where one who is entitled to bring an action for a tort dies before bringing the action, the right of action which, by sec. 41, is given to his legal personal representative must be asserted by the issue of a writ within one year from his death; otherwise it is gone.

The neat point now raised seems never to have been definitely decided, namely: Does the limitation apply where the deceased had already commenced an action and died before judgment?

Riddell, J., was of the opinion that the point was covered by *Ardagh v. County of York*, 17 P.R. 184; but, while the reasoning in that case may have some application here, the case itself is clearly distinguishable because there the limitation had reference to the original cause of action, which arose under a special statute giving certain rights if action were brought within one year from the passing of the Act itself. It was argued that the action, which had been duly brought within the year, could not be revived, "or in effect again commenced" after the expiry of that year. The Divisional Court summarily and quite properly disposed of that contention by holding that, if the defendants had not seen fit to move to dismiss for want of prosecution, they could not be heard to complain if the action were revived. The executors' right to continue the action there did not rest upon sec. 41 of the Trustee Act at all.

This is, of course, quite clear—the executor's right to recover depends upon sec. 41, and disappears if he brings no action within a year. But, while the cause of action is the same as that of the deceased, the section does not say that the cause of action survives (though that may be its proper construction); the section gives to the executor a distinct right to maintain an action for the same cause of action, and it may be that the section intends to give a new right and not merely to preserve the old one.

In suggesting this, I am not overlooking what was said by my brother Middleton in *England v. Lamb* (1918), 42 O.L.R. 60.

These and other considerations ought to be dealt with by the Appellate Division; and, as there appears to me to be sufficient reason to doubt the correctness of the judgment in question, and the appeal, in my opinion, involves matters of sufficient importance to justify my granting leave to appeal, I accordingly grant the necessary leave.

The costs of this application should be in the cause.

March 17. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, J.J.A.

G. H. Sedgewick, for the appellants, referred to *Mason v. Town of Peterborough*, 20 A.R. 683, 687; Rule 300; *Hunter v. Boyd* (1901), 3 O.L.R. 183, 188. The learned Judge had erred in holding that he was bound by the decision in *Ardagh v. County of York*, 17 P.R. 184—this case did come within it.

[LATCHFORD, C.J., referred to Rule 305, and Holmested's Judicature Act (1915), p. 771.]

Orde, J.A.

1925.

MACKIE
v.

HAMILTON
BOARD OF
HEALTH.

App. Div.

1925.

MACKIE
v.HAMILTON
BOARD OF
HEALTH.

A. J. Trebilcock, for the plaintiff, respondent, referred to Words and Phrases, vol. 1, p. 13, "Abatement of Action;" Daniell's Chancery Practice, 8th ed., vol. 1, pp. 227, 23; *Ardagh v. County of York*, *supra*.

April 3. The judgment of the Court was read by MIDDLETON, J.A.:—Appeal by the defendants from the order of Mr. Justice Riddell, bearing date the 18th February, 1925, allowing an appeal from an order of the Master in Chambers, dated the 29th January, 1925, setting aside an order to continue, issued from the office of the Local Registrar at Hamilton, on the 5th January, 1925.

The action was brought on the 25th November, 1920, claiming damages against the Board of Health for an alleged trespass committed in August, 1919. One of the two plaintiffs died on the 21st February, 1923. Letters of administration of his estate were not issued for some time, and the action was not revived until the issue of the order of the 15th January, 1923—more than a year after the death.

It is admitted that the cause of action falls within sec. 41 of the Act respecting Trustees and Executors, R.S.O. 1914, ch. 121. This section provides, with certain exceptions, that the executor or administrator of any deceased person may maintain an action for a tort to the property of the deceased, and have the same rights and remedies as the deceased if living would have been entitled to. The section further provides (subsec. 3) that an action under it shall not be brought after the expiration of one year from the death of the deceased. The defendants (appellants) here contend that the effect of this limitation is to require the action pending at the death of the plaintiff to be revived within one year of the death, in default of which the statutory right to sue would be gone. This contention commended itself to the learned Master, and he accordingly set aside the order of revivor, but, upon appeal, Mr. Justice Riddell took the view that the case was fully covered by the decision in *Ardagh v. County of York*, 17 P.R. 184, and allowed the appeal.

By the provisions of Rule 305, where a plaintiff has died, and proceedings may be continued, the defendant may apply to the Court, upon notice to those interested, to compel the person entitled to proceed with the action to proceed according to the provisions of this Rule, within such time as the Court may order, and in default the action may be dismissed for want of prosecution. In the case relied upon by my learned brother, a Divisional Court of the High Court of Justice determined that this was the only

rule, or provision, limiting the time in which an action already brought could be dealt with, and that an order to continue may be made at any time before the action has been dismissed under this provision.

This decision is, of course, not binding upon us, but we agree with it. Upon the death of the person injured, his administrator may "maintain" an action. The word "maintain" is apparently advisedly used to include not merely the bringing, but the continuing, of an action already brought. Subsection 3 of sec. 41 only limits the time within which an action may be "brought," and it would be an unwarrantable act of judicial legislation to extend this word so as to make that limitation applicable not merely to the bringing, but also to the reviving, of an action already brought.

Upon principle, the result arrived at appears to be satisfactory. The object of the legislation was to get rid of the effect of the rule of law embodied in the familiar maxim "*actio personalis*, etc.," and there can be no real reason for the making of any distinction between actions which can be continued only by virtue of this statute and actions which would themselves survive. Logically all should be, as they are, upon the same plane.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

BUTTRUM v. UDELL.

1925.

April 6.

Evidence—"Opinion Evidence"—Limitation of Number of Expert Witnesses at Trial of Action—Ontario Evidence Act, sec. 10—Testimony of Professional Men—Special Knowledge—Witnesses Called upon Different Branches of Case.

Section 10 of the Ontario Evidence Act limits to three the number of persons entitled, according to the law or practice, to give opinion "evidence" who may be called as witnesses upon either side without the leave of the Judge:—

Held (HODGINS, J.A., dissenting), that in an action to recover damages for personal injuries sustained by the plaintiffs, the testimony of a surgeon who had examined one of the plaintiffs immediately after the injury, and in the witness-box, after describing the plaintiff's then condition and injuries, stated that he had no doubt that her condition on the day of the trial, as testified to by herself and other witnesses, was brought about by the injuries which he had described, was that of a person "entitled, according to the law or practice, to give opinion evidence."

App. Div.

1925.

MACKIE

v.

HAMILTON
BOARD OF
HEALTH.

Middleton,
J.A.

1925. Section 10 has reference to opinion evidence founded in part or in whole on some special knowledge or qualification not possessed by the ordinary witness.
- BUTTRUM v. UDELL. Section 10 cannot be construed so as to permit three witnesses to be called on each branch of the case—the limitation is applicable to the number of witnesses called by either party in the course of the trial. *In re Scamen v. Canadian Northern Railway Co.* (1912), 6 D.L.R. 142, not followed.

APPEAL by the defendant in an action in the County Court of the County of Wentworth from the judgment of EVANS, Co.C.J., upon the verdict of a jury, in favour of the plaintiffs, three persons who were injured in a collision of motor vehicles upon a public highway, alleged to have been caused by the negligence of the defendant.

The appeal was on the ground that the plaintiffs had transgressed the provision of sec. 10 of the Evidence Act, R.S.O. 1914, ch. 26, by calling more than three medical witnesses to give opinion evidence.

January 26. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

C. W. Bell, K.C., for the appellant.

M. J. O'Reilly, K.C., for the plaintiffs, respondents.

The facts and arguments are fully stated in the judgments.

April 6. FERGUSON, J.A.:—I have had the advantage of reading the opinion of my brother Hodgins (*infra*), but I am unable to agree in the result proposed by him. So much money was expended in securing and paying witnesses qualified and called to give opinion evidence, and so much of the time of the Court was taken up in hearing their evidence, that it became necessary for the Legislature to provide a remedy, hence sec. 10 of the Evidence Act, R.S.O. 1914, ch. 76, which reads:—

“Where it is intended by any party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence not more than three of such witnesses may be called upon either side without the leave of the Judge or other person presiding, to be applied for before the examination of any of such witnesses.”

It is not difficult to comply with the requirements of the section, and to my way of thinking it is much better that a party who neglects to apply for and obtain leave to call more than three of such witnesses should be saddled with the result of his own neglect than that we should open the door for a return of the evil which the Act was intended to remedy.

I am of opinion that, if the words "opinion evidence" be given their natural and primary meaning rather than a secondary meaning, the evidence of Dr. Wythe falls within the term "opinion evidence" as used in the statute. Dr. Wythe testified that at the time of the accident he received an emergency call to attend the plaintiff Rena Henderson; and, after he had described her then condition and injuries, he was asked and answered the following questions:—

"Q. Did you attend her again? A. No, sir, I did not. I was called on an emergency call, but the case was Dr. Leach's; I turned it over to him.

"Q. You saw the young lady giving her evidence in the witness-box to-day, and you have heard the condition she is in to-day? A. Yes.

"Q. What do you say as to her present condition being brought about by these injuries? A. I would say it is altogether probable it was.

"Q. Is there any doubt about it? A. No."

At the trial the dispute was not as to whether the evidence of any of the five doctors called was or was not "opinion evidence," but rather as to whether the statutory limit applied to the whole trial, or only to each issue of fact, or to each branch of the plaintiff's case.

The report of the objections of the defendant's counsel to the admission of the evidence complained of and the ruling of the Judge are found at p. 103 of the transcript, and read:—

"George Rennie, M.D., called for plaintiffs by Mr. O'Reilly.

"Mr. Bell: I do not know whether I ought to object to the witness being sworn before he is asked any question, but I certainly object to his being called, because my friend has already had his limit of statutory witnesses as prescribed by the statute.

"Mr. O'Reilly: Dr. Leach was the attending physician, and Dr. Wythe was the emergency man.

"Mr. Bell: My friend has called three men whom he has attempted to qualify as experts, and he has asked them expert questions, and the statute is quite explicit on that point, that only three expert witnesses may be called.

"His Honour: They are experienced men, but they are called on different branches—you can call experts on different branches.

"Mr. Bell: The statute does not say so. I raise the objection that under the statute he can only call three witnesses to give expert testimony, and he has called those three, and he cannot call more than three under the statute.

App. Div.

1925.

BUTTRUM

v.

UDELL.

Ferguson,

J.A.

App. Div.

1925.

BUTTRUM

v.

UDELL.

Ferguson,
J.A.

“His Honour: I will give my ruling. It is contended by Mr. Bell that Mr. O'Reilly has already called three witnesses and has exhausted the limit given to him under the statute, but I hold that under the circumstances the three he has called, being experts on altogether different branches of the case, he is entitled to call Dr. Rennie.”

I cannot find in the words of the statute any ambiguity or anything that allows us to give to the statute the limited or restricted meaning and effect given it by the Alberta Court in *In re Scamen v. Canadian Northern Railway Co.* (1912), 6 D.L.R. 142, or in this case by the trial Judge; and, with deference, I am of opinion that the remedy proposed by these Courts is worse than the disease, and that it is much better that the number of such witnesses called during a trial should be limited to three on each side, and such others as the Court may on application allow, than that the number of these witnesses should be limited only by the number of issues of fact that may actually arise in the course of a trial, or that counsel can with some show of reason argue will arise or have arisen during the trial. If the latter interpretation be given the statute, or if the words “opinion evidence” be given the meaning and effect suggested by my brother Hodgins, a trial Judge could not refuse to hear any such witness, because, before hearing what the witness had to say, he could not satisfactorily determine to just what issue of fact the evidence was applicable, or whether the evidence would amount to “opinion evidence,” and thus the statute would, I think, either become a dead letter or a new source of trouble, expense, and delay.

I do not think it wise to attempt to define what is “opinion evidence” within the meaning of the statute, for it seems to me the definition should, to some extent, vary with the circumstances of each case. However, I think I should indicate my view, which is that the statute has reference to opinion evidence founded in part or in whole on some special knowledge or qualification not possessed by the ordinary witness. For instance, if the mental capacity of a testator were in issue, and his closest friend or business associate were called and expressed an opinion founded on his acquaintance with the testator, I think that the statement of such witness would not be opinion evidence within the statute. On the other hand, if the testator's physician were called and expressed an opinion, founding his statement in part on his knowledge of the testator's habits and acts, and also in part on his special knowledge of mental diseases, the statement of such physician would,

I think, be opinion evidence within the statute, because his opinion is founded on a special knowledge or qualification not possessed by the other witness.*

I would allow the appeal with costs and direct a new trial; costs of the last trial to be costs in the cause to the defendant.

MULOCK, C.J.O.:—I agree. As to the costs of the trial, the defendant having objected to the plaintiffs calling the expert witnesses in question, and the plaintiffs having claimed the right to call them, the plaintiffs must be held responsible for the consequences, and therefore must bear the defendant's costs of the trial and of the appeal—the same to be costs in the cause to the defendant in any event.

SMITH, J.A., was of the same opinion as MULOCK, C.J.O.

HODGINS, J.A.:—Appeal by the defendant against the judgment directed to be entered by Evans, County Court Judge of Wentworth, after trial before him with a jury, in favour of the plaintiff Rena Henderson for \$3,500. The action arose out of a motor accident in which the plaintiff Rena Henderson was hurt. Her injuries were a severe cut across the knee-joint, going through the skin and flesh as far as the bone, a fractured rib, and a cut lip.

The sole question is, whether there should be a new trial because more than three witnesses were permitted to give opinion evidence, without permission obtained from the trial Judge before any one of them was called, pursuant to the Evidence Act, R.S.O. 1914, ch. 76, sec. 10.

I have carefully read and considered the evidence, and it is clear that there were three witnesses, Drs. Leach, Rennie, and Earl, who could be said to have given what is known as expert or opinion evidence. The question to be settled is whether Dr. Wythe and Dr. Hess did so or whether their evidence falls without the statutory description.

[The learned Judge quoted sec. 10, as above.]

Dr. Wythe was near at hand and was called in at once after the accident. He took the plaintiff to the hospital and says that, after thoroughly examining her injuries, he strapped up the broken rib, stitched the top fascia over the patella—the fascia being a fibrous covering attached to the knee and below and covering the patella itself—tied up the several arteries, and arranged the skin over. He was asked:—

* See *Robins v. National Trust Co.*, ante 46.

App. Div.
1925.

BUTTRUM
v.
UDELL.

Ferguson,
J.A.

App. Div.

1925.

BUTTRUM

v.

UDELL.

Hodgins,

J.A.

“Did you attend her again? A. No, sir, I did not. I was called on an emergency call, but the case was Dr. Leach’s—I turned it over to him.

“Q. You saw the young lady giving her evidence in the witness-box to-day, and you have heard the condition she is in to-day? A. Yes.

“Q. What do you say as to her present condition being brought about by these injuries? A. I would say it is altogether probable it was.

“Q. Is there any doubt about it? A. No.

“Q. No doubt. You had a bill against them for \$25? A. Yes.”

The remainder of his evidence is directed to explaining just what he saw and did, and the nature and extent of the injuries.

The statute in question must be given a reasonable interpretation so far as possible; and, while “opinion evidence” cannot be confined to that of admitted experts, its meaning should not be unduly expanded, so as to shut out evidence necessary to enable the facts not only to be brought out, but to be properly understood.

I do not regard the evidence I have quoted as involving any opinion evidence such as the statute is directed to. It is merely a statement intended to connect the hurt suffered by the plaintiff with her condition as she described it at the trial. It identifies the injuries then inflicted by the motor collision, as being the cause of the resultant condition, and as naturally following from what he saw and dressed, and so enabled the evidence of the expert witnesses who had not seen them, to be related with certainty to the cause alleged by her.

It is of the class of evidence thus described:—

“Where a witness speaks from his personal knowledge, and, after stating the facts, adds his opinion upon them, or, in a certain class of cases, gives his opinion without detailing the facts on which it is founded, his testimony is received as founded not on his judgment, but on his knowledge. . . . The judgment of a witness founded on actual observation . . . is different from and more than a mere opinion of an expert. It approaches to knowledge, and in fact is knowledge so far as the imperfection of human nature will permit knowledge of these things to be acquired, and such knowledge is proper evidence for the jury.” *Dunham’s Appeal* (1858), 27 Conn. 192, 198, 199.

The same conception is found in the statement of Dr. Lushington in *Collett v. Collett* (1838), 1 Curteis 678, in discussing

the reception of what he calls (p. 687) a superior kind of evidence coming from a medical man, namely, opinions founded upon his own observation and inspection. "How is it possible," he says, "that the Court, having no medical education, could deduce from the symptoms that the disease was of this or that character?"

It is also stated somewhat in the same way by Baron Alderson in *Wright v. Tatham* (1838), 5 Cl. & F. 670, 720, 721, in speaking of evidence given on the question of mental capacity:—

"You call persons who have known him for years, who have seen him frequently, who have conversed with him or corresponded with him. After having thus ascertained their means of knowledge, the question is put generally as to their opinion of his capacity. I conceive this question really means to involve an inquiry as to the effect of all the acts which the witnesses have seen the testator do for a long series of years, and the manner in which he was during that period treated by those with whom he was living in familiar intercourse. This is not properly opinion, like that of experts; but is rather a compendious mode of putting one instead of a multitude of questions to the witness under examination, as to the acts and conduct of the testator. Instances of such questions are not uncommon. A witness in a case of assault is frequently asked his opinion which of the two, the plaintiff or defendant, began the affray; no one considers the opinion of a witness in such a case as evidence; but when it is obvious that he has seen the whole, and can, if required, state all the circumstances in detail, such a compendious mode of putting the question is often allowed without objection. But there, the real meaning of the question is, what were the circumstances of the transaction: and unless the witness be then capable of deposing to them, the opinion could not be received at all."

The evidence of Dr. Hess is confined to deposing to the fact that he took an X-ray plate of the knee of the plaintiff and to explaining what it revealed. He was asked:—

"Q. Are you in a position to speak from your experience of these things as to what the condition of the patient will be, say, in a year from now, or how you would expect to find her? A. I made no examination of the patient other than the X-ray, and I have not heard the patient's evidence."

His testimony contains no opinion evidence, but is limited to explaining the indications given by the plate made by him.

This confines the number of those who gave opinion evidence to three, Dr. Leach (if his evidence can be properly so called).

App. Div.

1925.

BUTTRUM

v.

UDELL.

Hodgins,
J.A.

App. Div. Dr. Rennie, and Dr. Earl. Consequently it is unnecessary to consider the correctness of the view expressed by the learned trial Judge that the evidence of three experts upon each different branch of knowledge is not excluded by the statute, as was suggested by the Alberta Supreme Court in *In re Scamen v. Canadian Northern Railway Co.*, 6 D.L.R. 142. This case does not really raise that question.

The appeal should therefore be dismissed with costs.

MAGEE, J.A., agreed with HODGINS, J.A.

New trial ordered (MAGEE and HODGINS, JJ.A., dissenting).

[The order of the Court as to costs, in the judgment as entered, was that the costs of the former trial be costs in the cause to the defendant in any event, and that the plaintiffs do pay to the defendant the costs of this appeal forthwith after taxation thereof.]

[APPELLATE DIVISION.]

1925.

DOYLE v. MCKINNON.

April 6.

Contract—Guaranty—Statute of Frauds—Findings of Trial Judge—Appeal.

The judgment of LOGIE, J., 56 O.L.R. 298, was affirmed.

APPEAL by the defendants from the judgment of LOGIE, J., 56 O.L.R. 298.

February 27 and March 9. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

Gideon Grant, K.C., for the appellants, argued that the goods were supplied to Freel on the plaintiff's credit, and payment therefor was to be taken out of a mortgage given to the plaintiff by one of the firm of McKinnon Bros. The plaintiff did not guarantee the debt, and the Statute of Frauds did not apply: *Watson Bros. v. Jones* (1910), 125 La. 249; *Lakeman v. Mountstephen* (1874), L.R. 7 H.L. 17; Annotation on "Guarantees and the Statute of Frauds," 55 D.L.R. 1; *Sampson v. Burton* (1820), 4 Moo. R. 515.

James Haverson, K.C., for the plaintiff, respondent, contended that the goods were supplied on the credit of Freel; the debt of Freel was guaranteed by the plaintiff, but not in the manner re-

quired by the Statute of Frauds: *Birkmyr v. Darnell* (1704), 1 Smith's L.C., 12th ed., 335; Halsbury's Laws of England, vol. 15, paras. 889 to 893; *Bond v. Treahey* (1875), 37 U.C.R. 360.

App. Div.
1925.
DOYLE
v.
McKINNON.

April 6. The judgment of the Court was read by FERGUSON, J.A.:—I have carefully considered the evidence in the light of the argument, and am of the opinion that it was not agreed either that the defendant J. H. McKinnon might deduct from the moneys he owed the plaintiff sufficient to pay Freel's debt to McKinnon Bros. or that the defendant J. H. McKinnon might pay Freel's debt to the firm and charge the amount of such payment against the plaintiff.

The evidence is clear that it was the plaintiff who was to pay McKinnon Bros., and not the defendant J. H. McKinnon; and, for the reasons stated by the learned trial Judge, which are quite satisfactory to me, I would dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

MURPHY WALL BED CO. OF DETROIT v. LEVIN.

1925.
April 6.

Fixtures—"Wall-beds" Installed in Building—Attachment in such a Way as to be Removable without Injury to Building—Beds Sold to Contractor for Building under Conditional Sale Contract—Conditional Sales Act, secs. 3, 9—"Goods"—"Household Furniture"—Right of Owner of Building to Retain Beds on Payment of Amount Due thereon—Costs.

Beds of a kind described as "wall-beds" were sold by the plaintiffs to the defendant G. upon the terms of a conditional sale agreement, which was not filed as required by sec. 3(1)(b) of the Conditional Sales Act. The beds were installed by the plaintiffs in a house which G. had contracted to build for the defendant L. The beds were installed in such a manner that, like tenants' fixtures, they might be removed from the building without injuring it, although attached or affixed to it:—

Held, that, in these circumstances, the beds were still goods within the meaning of sec. 9 of the Act, and, when sold, were of the class described in sec. 3 as "household furniture," and affixing them to the realty did not change their nature or their class.

The beds were, therefore, under the conditional sale contract, the property of the plaintiffs and removable by them, subject, however, to the right of the defendant L. to retain them on payment of the balance due thereon.

The plaintiffs having always been willing to allow L. to retain the beds upon payment of what was due, and L. having claimed the

App. Div.

1925.

MURPHY
WALL BED
Co.
OF DETROIT
v.
LEVIN.

right to retain them without making any payment, the plaintiffs were entitled to their costs of the unsuccessful appeal of L. from the judgment at the trial in favour of the plaintiffs.

APPEAL by the defendant Levin from the judgment of the County Court of the County of Essex in favour of the plaintiffs in an action to recover possession of certain chattels ("wall-beds") sold to the defendant Gray upon the terms of a conditional sale agreement.

March 10. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

R. S. Robertson, K.C., for the appellant, argued that the beds were part of the realty: *Finney v. Grice* (1878), 10 Ch. D. 13; *In re Seton-Smith*, [1902] 1 Ch. 717; *Hoover-Owens Rentschler Co. v. Gulf Navigation Co. Incd.* (1923), 24 O.W.N. 614. When the vendor had a contract to "install" the beds, he was not delivering household goods, but was supplying material for the building, and therefore the beds were not "household goods" within the meaning of sec. 3 of the Conditional Sales Act, R.S.O. 1914, ch. 136. Even if the beds were household furniture, the appellant could retain them on payment of the balance due upon them, under the provisions of sec. 9.* The vendor would be entitled to a

* The material provisions of sec. 3 and the provisions of sec. 9 are as follows:—

3.—(1) Where possession of goods is delivered to a purchaser, or a proposed purchaser or a hirer of them, in pursuance of a contract which provides that the ownership is to remain in the seller or lender for hire until payment of the purchase or consideration money or part of it, as against a subsequent purchaser or mortgagee claiming from or under the purchaser, proposed purchaser or hirer, without notice in good faith and for valuable consideration, such provision shall be invalid, and such purchaser, or proposed purchaser or hirer, shall be deemed the owner of the goods, unless

(a) the contract is evidenced by a writing signed by the purchaser, proposed purchaser or hirer or his agent, stating the terms and conditions of the sale or hiring and describing the goods sold or lent for hire; and,

(b) within ten days after the execution of the contract a true copy of it is filed in the office of the clerk of the County or District Court of the county or district in which the purchaser, proposed purchaser or hirer resided at the time of the sale or hiring. . . .

(5) Clause (b) of subsection 1 shall not apply . . . to a contract respecting household furniture other than pianos, organs or other musical instruments.

9. Where the goods have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them.

mechanic's lien for the price of the goods. There was a dispute about an item of \$200 which had been wrongly applied by the plaintiffs.

H. S. White, K.C., for the plaintiffs, respondents, contended that the beds were household furniture within the meaning of the Act. A bed is ordinarily household furniture. The beds were not part of the building, within the meaning of sec. 9, but merely affixed to it—they could be moved to another building. Even if affixed to the realty, the plaintiffs had the right to repossess them unless the appellant would pay the balance due. As the beds were household furniture, within the meaning of sec. 3 of the Act, it was not necessary to file the contract of sale. As to the meaning of "household furniture," *Barron's Conditional Sales Act*, 2nd ed., pp. 72, 73, and *Kelly v. Powlet* (1763), 2 Ambl. 605, may be referred to.

April 6. The judgment of the Court was read by FERGUSON, J.A.:—Appeal by the defendant Levin from a judgment of his Honour Judge Coughlin, of the County Court of Essex, declaring that certain goods, described as "wall-beds," are the property of the plaintiffs. The beds were installed by the plaintiffs in an apartment-house which the defendant Gray had contracted to build for Levin, and under a conditional sale agreement between the plaintiffs and Gray.

To install the beds, steel plates are screwed to the floor of the bedroom, and to the side of a closet door therein. The floor plates have holes or sockets in which the legs of the bed are set; while the plates on the side of the closet door have similar sockets into which a piece of iron attached to the side or end of the beds sinks, when the bed is closed up. The bed may be removed from the room or building by lifting it out of these sockets.

The appellant contends:—

- (1) That the beds are part of the realty.
- (2) That because the vendors installed these beds they cannot now assert that the beds are still goods, or that they are "household furniture," within the meaning of sec. 3 of the Conditional Sales Act, R.S.O. 1914, ch. 136.

- (3) That, if the beds are still goods and household furniture, sec. 9 of the Act gives the appellant the right to retain them on payment of the balance due thereon.

The respondents contend:—

- (1) That, at the time the conditional sale contract was made, the goods were "household furniture," and therefore goods

App. Div.

1925.

MURPHY
WALL BED
Co.
OF DETROIT
v.
LEVIN.

App. Div. in respect to the sale of which it was not necessary to file the contract (see sec. 3).
1925.

MURPHY
WALL BED
Co.
OF DETROIT
v.
LEVIN.
Ferguson,
J.A.

(2) That, even if affixed to the realty, the plaintiffs have the right to repossess them unless the appellant pays the balance due (see sec. 9).

(3) That the goods are not part of the building or realty, but merely affixed thereto, within the meaning of sec. 9.

I have perused and considered the evidence and exhibits in the light of the argument of counsel. It is clear that these beds are not built into the building in such a way that they may not be removed without injury to the structure. That the goods could not be so removed was, I think, the basis of the decision of Mr. Justice Smith in *Hoover-Owens Rentschler Co. v. Gulf Navigation Co.*, 24 O.W.N. 614; for, as pointed out in *Boswell v. Crucible Steel Co.*, [1925] 1 K.B. 119, the expression "fixtures" means something affixed as an accessory to the house rather than something which forms part of the structure or house itself.

On the other hand, it is clear that the beds are attached or affixed to the building, but in such a way that, like tenant's fixtures, they may be removed without injury to the building; and I am of opinion that it is to goods attached or affixed in such a way that sec. 9 is applicable, and that therefore the beds here in question are still "goods" within the meaning of sec. 9.

That brings me to the question: Were the goods at the time of the making of the contract, and at the time of their delivery, that is, when they were installed, goods of the class described in sec. 3 as "household furniture?" If they were not household furniture, the contract not being filed, the plaintiffs cannot claim them as against the appellant. If, on the other hand, they were and are "household furniture" within the meaning of the Act, it was not necessary to file the contract, and the plaintiffs' contractual rights in respect thereof continue.

A reference to several dictionaries and a perusal of the authorities cited convince me that the words "household furniture" may have one significance in one context and a different significance in another, and that the meaning of the words must be ascertained by reading the whole contract in which they are used, and taking into consideration the objects and purposes of the whole Act.

I am clear that before the beds were installed they were goods of a class described in sec. 3 as "household furniture;" and, considering the object and purpose of the Conditional Sales Act, and particularly the wording of sec. 9 thereof, I am of opinion that

affixing them to the realty in the way I have described did not change their nature or their class; and, therefore, that it was not necessary to preserve the plaintiffs' ownership therein that the conditional sale contract should be filed, and that the beds are still goods and "household furniture" within the meaning of those words as used in the Act, and consequently under the conditional sale contract the property of the plaintiffs, removable by them, subject, however, to the right of the appellant to retain them on payment of the balance due thereon.

There is a dispute between the parties to the appeal in reference to a credit which the appellant claims, and which the respondents do not admit. The learned Judge did not determine this dispute or fix the amount due; and, if the appellant elects to keep the beds and the parties are unable to agree on the amount due, there will be a reference to the trial Judge to fix the amount—costs of the reference to be disposed of by the trial Judge. Subject to this direction, I would dismiss the appeal.

As the respondents have always been willing to allow the appellant to retain the goods on payment of the balance due thereon, but the appellant claims the right to retain them without making any payment, the respondents are entitled to the costs of the appeal.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

GOODMAN AND ATTORNEY-GENERAL FOR CANADA V. BANK OF
TORONTO.

1925.

April 6.

Revenue—Excise Tax—Special War Revenue Act, 1915—Amending Act, 12 & 13 Geo. V. ch. 47, secs. 13, 17—Charge upon Property of Bankrupt Debtor—Customer of Bank—Moneys Collected by Bank upon Bills Drawn by Customer upon Purchasers from him—Whether Assets of Debtor—Tax Payable by Seller—Liability of Purchasers.

The judgment of ROSE, J., 56 O.L.R. 318, was affirmed.

Held, that the excise tax imposed by sec. 19 BBB(1) of the Special War Revenue Act, 1915, as enacted by (1922) 12 & 13 Geo. V. ch. 47, sec. 13, is not a tax on purchases but on sales; and, therefore, the section implies that it is payable by the seller.

In this case, the purchasers from S., the debtor who, being indebted to the bank, made an authorised assignment under the Bankruptcy Act, having paid to the bank the amounts of the bills drawn upon them by S., payable to the order of the bank, were freed from any

App. Div.

1925.

MURPHY
WALL BED
Co.
OF DETROIT
v.
LEVIN.

Ferguson,
J.A.

App. Div.
 ———
 1925.
 ———
 GOODMAN
 AND
 ATTORNEY-
 GENERAL
 FOR CANADA
 v.
 BANK
 OF TORONTO.

liability in respect of S.'s unpaid excise taxes; and, the bank having paid over to S.'s trustee the balance remaining in its hands after payment of S.'s indebtedness, the contention of the plaintiffs that, by reason of the provisions of sec. 17 of the amending Act of 1922, the moneys paid to and retained by the bank were chargeable with payment of S.'s unpaid excise taxes, failed.

AN appeal by the plaintiffs from the judgment of ROSE, J., 56 O.L.R. 318.

March 10 and 11. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

George Wilkie, K.C., and *A. M. Latchford*, for the appellants, argued that the accepted drafts in question were not the bank's property, but Stevenson's, and that the bank held them only as collateral security in respect of advances to Stevenson. Under sec. 17 of 12 & 13 Geo. V. ch. 47 the moneys paid to the bank on these drafts, and retained by the bank, were chargeable in the bank's hands with payment of the sales taxes owing by Stevenson to the Government. The "first charge" to which sec. 17 of the Act subjects the "assets" of a person who is indebted to the Crown for sales taxes, entitled the Crown, in the circumstances of this case, to be paid the taxes out of the proceeds of the drafts in question: *Versailles Sweets Ltd. v. Attorney-General of Canada*, [1924] S.C.R. 466; *Rex v. Dominion Cartridge Co. Ltd.*, [1923] Ex. C.R. 93; *Montreal Trust Co. v. The King*, [1924] 1 D.L.R. 1030; *Montreal Trust Co. v. South Shore Lumber Co.* (1923), 32 B.C.R. 354; *West v. Williams*, [1899] 1 Ch. 132; *Kemerer v. Watterson* (1910), 20 O.L.R. 451.

R. S. Robertson, K.C., for the defendants, respondents, relied upon the reasons for judgment of the learned trial Judge; and submitted that, in any event, the purchasers of the goods from the debtor would be the persons who had been in possession of the only thing which could be called an asset; and that if any one was restrained by the statute from dealing with the amount owing, without payment of the sales taxes, it would be they. On the question of what are assets, counsel referred to *Roxburgh v. Cox* (1881), 17 Ch. D. 520; *Tancred v. Delagoa Bay and East Africa Railway Co.* (1889), 23 Q.B.D. 239; Halsbury's Laws of England, vol. 21, p. 83; *Mercantile Bank of London Ltd. v. Evans*, [1899] 2 Q.B. 613.

April 6. The judgment of the Court was read by MULOCK, C.J.O.:—This is an appeal from the judgment of ROSE, J., dismissing the action. The facts are fully and clearly stated in the reasons

of the learned trial Judge for judgment, and may be summarised as follows:—

James Stevenson, trading under the name of J. Stevenson & Co., carrying on the business of manufacturer, became indebted to the Dominion Government for excise taxes payable under the provisions of the Special War Revenue Act, 1915, as amended by 12 & 13 Geo. V. ch. 47, sec. 13, in respect of "sales and deliveries" by him, and was so indebted when, on the 13th November, 1923, he made an authorised assignment in bankruptcy, and the plaintiff Goodman was appointed trustee of the estate. In the course of his business, Stevenson drew upon various purchasers for moneys owing to him for goods sold and delivered to them. The drafts were made payable to the order of the Bank of Toronto, and were accepted and paid by the acceptors to the bank. Stevenson was indebted to the bank, and the drafts had been hypothecated to the bank as security for such indebtedness, and the bank applied (which as against Stevenson it was entitled to do) so much of the moneys so received as was sufficient to pay Stevenson's indebtedness, and paid over the surplus to the authorised trustee. The plaintiffs, on behalf of the Dominion Government, contend that by reason of the provisions of sec. 17 of the amending Act, the moneys so paid to and retained by the bank were chargeable in the bank's hands with payment of the excise taxes owing by Stevenson to the Government, and they ask that the bank be ordered to pay to the plaintiffs the amount of the unpaid excise taxes not exceeding the amount so retained by the bank.

Section 17 reads as follows:—

"Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm or corporation, for payment of the excise taxes specified in the Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets."

I agree with the learned trial Judge that, for the reasons given by him, the bank has a complete answer to the plaintiffs' claim; but, as the question is one which widely concerns the business interests of the country, it appears to me advisable to discuss further certain provisions of the Act.

The excise tax in question, as it now exists, was imposed by sec.

App. Div.

1925.

GOODMAN
AND
ATTORNEY-
GENERAL
FOR CANADA
v.
BANK
OF TORONTO.
Mulock,
C.J.O.

App. Div. 19 BBB(1) of the Special War Revenue Act, 1915, as enacted by
 1925. 12 & 13 Geo. V. ch. 47, sec. 13, in the following words:—

GOODMAN
 AND
 ATTORNEY-
 GENERAL
 FOR CANADA

“ In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected an excise tax of two and one-quarter per cent. *on sales and deliveries* by Canadian manufacturers or producers,” etc.

v.
 BANK
 OF TORONTO.

Mulock,
 C.J.O.

This excise tax is not a tax on purchases but on sales; and, therefore, the section implies that it is payable by the seller. Whether the purchaser buys either for cash or upon credit, in either case the contract price is the total amount payable by him for the unqualified ownership of the goods free from all liens or incumbrances. Indebtedness to the vendor in respect of the purchase-price is an asset of the vendor; and if, before attachment, the purchaser pays the amount owing to the vendor or his appointee, such asset ceases to exist and with it any charge upon it.

If the indebtedness be only conditionally paid by the purchaser before attachment, as for example by the acceptance of a bill of exchange drawn upon him by the vendor payable to a third person, who, as against the drawer, is entitled to it, in such case, so long as such third person is *dominus* of the bill, payment of the indebtedness is suspended: *In re A Debtor*, [1908] 1 K.B. 344; *Dennis v. Reilly*, [1898] 1 Q.B. 1; but when the bill is paid the indebtedness is discharged.

The plaintiffs might have put themselves in a position whereby they would have been entitled to redeem the bank as holder of the bills, but redemption would not have enlarged the purchasers' liabilities, which were always limited to payment of the contract price only.

Having paid to the bank the bills drawn upon them respectively by the vendor, the purchasers thereby discharged their indebtedness as such purchasers, and are freed from any liability in respect of Stevenson's unpaid excise taxes; and, the bank having paid over to the trustee the balance remaining in its hands after payment of Stevenson's indebtedness, the action was rightly dismissed, and this appeal fails.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

CUTTEN V. BICKELL.

1924.

July 21.

1925.

April 6.

Brokers—Dealings in Foreign Stocks and Commodities—Profits—Payment over to Customer—Rate of Exchange—Whether Customer Entitled to Benefit of Difference—Accounting—Times at which Exchange to be Accounted for—Costs.

In the years 1919 and 1920, the defendants, brokers in Toronto, bought and sold, through their agents in New York, shares of stocks and bales of cotton upon the New York Stock and Cotton Exchanges, for the plaintiff, their customer or client, in Toronto. The plaintiff made deposits of money in Canadian currency with the defendants as security for his trading account. The profits, large in amount, which arose out of the transactions, were received by the defendants' New York agents in United States currency, and paid over by the defendants to the plaintiff in Canadian currency, without accounting for the difference in value of the dollar, according to the rate of exchange between the two countries—which, in the years mentioned, was in favour of the United States:—

Held, that, in the circumstances surrounding the transactions, as shewn in the evidence, the plaintiff was entitled to recover the difference with interest.

A contract to the effect that, if the defendants bought the shares, etc., in New York, by the means they had of buying there, so that the risk of exchange would not be the plaintiff's, the plaintiff would entrust the transactions to the defendants as his brokers, was not to be implied.

Barthelmes v. Bickell (1921), 62 Can. S.C.R. 599, followed.

Held, also, that, as the plaintiff did not give any instructions to the defendants to keep his profits in New York until he desired to draw them, it was the defendants' duty to reduce them into possession and transfer them to their own custody in Toronto promptly. By a system of cross-entries between themselves and their New York agents, they did this, and therefore should not be charged exchange on the basis that they had in fact retained the plaintiff's profits in New York until the date on which they paid them over to the plaintiff.

Question of costs considered.

ACTION by a customer of the defendants, who were brokers in Toronto, to recover the difference between United States and Canadian currency in respect of payments made by the defendants to the plaintiff.

The action was tried by MOWAT, J., without a jury, at a Toronto sittings.

A. G. Slaght, K.C., and *F. J. Hughes*, for the plaintiff.

W. N. Tilley, K.C., and *Strachan Johnston*, K.C., for the defendants.

July 21, 1924. MOWAT, J.:—This is a struggle between a stock market operator and his brokers to determine whether the price of

Mowat, J. stocks and commodities sold in New York should be payable in American dollars or Canadian money.
1924.

CUTTEN
v.
BICKELL.

The question became acute when, owing to war conditions in Canada in 1920, the rate of exchange between New York and Toronto had jumped rapidly from the time the trading was commenced, when the difference in rate was negligible.

Lionel Cutten, in April, 1919, commenced buying bales of cotton through the defendants, the brokers, J. P. Bickell & Co. Only one of the purchases was made at his own instance—the others in the chain of transactions were for his brother, Arthur Cutten, a prominent operator on the Chicago and New York Exchanges, indeed to an extent which has given him a national prominence.

These transactions were carried through the New York Cotton Exchange, and there were some further purchases of shares of American Rubber stock, also for Arthur Cutten, but in the name of Lionel.

As security or margin, Lionel sent his cheque on a Canadian bank to the defendants for \$10,000, at the instance of Arthur, and doubtless the money was that of Arthur.

The trading was quite successful, because, after 8 months of transactions, the plaintiff received \$100,000 profits on account, upon which he now claims a premium, being the difference between Canadian and New York funds and \$112,202.20, which was included in the defendants' cheque for \$162,212.20 owing, to close the transactions, which covered \$50,000 which the plaintiff had returned later on by way of further margin at a time when the market was uncertain.

The plaintiff here claims as the difference between values of funds in the two countries, \$22,515.01.

This history makes the case like that of *Barthelmes v. Bickell* (1921), 62 Can. S.C.R. 599, holding that in the absence of any agreement, express or implied, to the contrary, or of a custom of the stock market of which the plaintiff must be presumed to be aware, profits paid in American currency must go to the customer. But counsel for the defendants, conducting the defence with force and spirit, urge that there are differences in *Barthelmes v. Bickell*. In that case there were no such cogent facts as:—

(1) The acceptance without demur of \$100,000 interim payment in Canadian money on account of profit.

(2) Payment of \$10,000 margin and \$50,000 further margin in Canadian currency.

(3) A general acquiescence in the transaction being considered as a Canadian deal in payments by and payments to the principal.

(4) Expert knowledge of Arthur Cutten, who was master of the transactions, and who as an experienced dealer must have been taken to have known a custom that profits on Canadian deals as well as payments of margins would be paid in Canadian currency, and also that no profits were realised by way of exchange premium by the brokers, they dealing in balances only with their New York agents, through a local account of the latter in a Toronto bank, where difference in exchange was not taken into account.

The considerations so urged do not, however, seem to bring the case outside the principles laid down in *Barthelmes v. Bickell*, which decided that, however convenient the practice which had been arranged between the brokers and their New York agents, it could not be allowed to defeat an individual claim of a customer to get the advantage of the difference in exchange premium apart from the accounting with the whole body of the brokers' customers when he sold his stocks or commodities in New York.

It is to be noted that the action in the *Barthelmes* case was commenced on the 12th February, 1920, and after the trading had already commenced in the present case, so that the decision in the earlier case could not have been present to the minds of either party here.

Following the decision of the earlier case, judgment for the difference in exchange must be awarded to the plaintiff, namely, \$22,515.01, with interest from the 9th February, 1920.

The plaintiff claims also from the defendants interest upon moneys of his in their hands from time to time, and an accounting. It is a well understood rule that when a customer employs a broker to buy on margin he is bound to pay the interest upon the unpaid purchase-money which the broker borrows from a bank, and also something in addition for the trouble of the financing. But there is on the other hand no rule that the broker shall pay interest on moneys of his principal to his credit. The broker is an agent. The right to be paid interest depends on contract, express or implied. There is no contractual relation here. The customer can always draw any balance in his favour. This claim of the plaintiff fails, as also does his claim for an accounting of the rate of interest paid to the brokers. He knew from the interim accounts what he was being charged: and, having made no protest, he cannot now open the account which must be deemed to have been settled.

Under all the circumstances of the case, and there being partial success to each party, there will be no costs.

Mowat, J.

1924.

CUTTEN
v.

BICKELL.

The defendants appealed from the judgment of Mowat, J.

App. Div.

1925.

CUTTEN
v.

BICKELL.

March 25 and 26. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

W. N. Tilley, K.C., and Strachan Johnston, K.C., for the appellants, argued that the evidence shewed that the plaintiff had made many large payments to the defendants in Canadian funds and had received credit in these instances at par, not being charged New York exchange thereon, and that he had been charged with all payments made on his behalf by the defendants in Canadian funds only, without being charged New York exchange thereon, and that accounts in Canadian funds were rendered to him from time to time and accepted by him as the basis of his transactions with the defendants; and consequently it should have been held that any moneys payable by the defendants to the plaintiff were payable in Canadian funds. The arrangements made by the defendants with New York brokers to receive payment and make payment in Canadian funds was a reasonable one, and should have been held binding on the plaintiff. The defendants had accounted to the plaintiff for all moneys received on his behalf. The learned trial Judge erred in giving judgment for the plaintiff on the basis of the New York exchange at the dates of the issue of cheques by the defendants to the plaintiff, for in no event was the plaintiff entitled to exchange at a higher rate than that prevailing on the dates of the closing by the defendants of the different transactions of the plaintiff in accordance with his instructions. Counsel also contended that there was an implied contract between the parties that Bickell & Co. were to buy these stocks in New York in such a way as to take the risk of exchange off the plaintiff, in this way distinguishing the case from that of *Barthelmes v. Bickell*, 62 Can. S.C.R. 599.

A. G. Slaght, K.C., and F. J. Hughes, for the plaintiff, respondent, denied the existence of any agreement, express or implied, or of any custom of the stock market, or of any practice among brokers of which the plaintiff could be presumed to be aware, whereby the respondent was to be considered as not entitled to be paid the profits of the transactions between him and Bickell & Co. in American money. Therefore the *Barthelmes* case applied. The amount to be paid should be fixed by reference to the dates on which the appellants paid over the profit to the respondent, as held by the learned trial Judge. The liability of the appellants rested upon the fiduciary relationship of the broker to account to the customer, his principal, for the full profits of the ventures, less his regular charges.

April 6. The judgment of the Court was read by FERGUSON, J.A.:—Appeal by the defendants from a judgment of Mowat, J.,

awarding the plaintiff \$22,505.01, with interest thereon from the 9th February, 1920, as due by the defendants to the plaintiff for exchange in respect of profits made by the plaintiff on certain purchases and sales of shares and cotton which the plaintiff, through the defendants as his brokers, made on the New York Stock and Cotton Exchanges in the years 1919 and 1920.

It is conceded that unless the defendants have established facts and circumstances from which the Court, considering the relationship of the parties and their course of dealing, can imply a special contract between the parties which distinguishes this case from that of *Barthelmes v. Bickell*, 62 Can. S.C.R. 599, the main appeal fails.

It therefore becomes important, at the outset, to get clearly in mind just what the contract is that the defendants say should be implied; that there may be no doubt as to what it is, I quote Mr. Tilley's statement thereof:—

“My submission is there was the implied contract. The implied contract was, that ‘if you (Bickell) have this (the stocks) bought in New York by the means that you have of buying there, so that the risk of exchange will be taken off me, I (Cuttan) will do this business with you.’ If I have not made that out, I have not made my point.”

It is conceded that the relationship of the parties was that of broker and client, and not that of vendor and purchaser; that the stocks and cotton traded in were to be bought in New York on the New York Stock Exchange and the cotton in New York on the Cotton Exchange; that they were bought and sold there; that on such purchase and resale the price thereof was paid in New York and in American money; that, had the plaintiff asked for delivery of his stocks, he could have had delivery, but only on payment therefor in American money; that the plaintiff's deposits of \$10,000, \$7,877.78, and \$50,000, were not made or received as part payment for any particular stock or purchase of cotton, but were made, received, and held in Toronto as security for the plaintiff's trading account; that the profit realised from the sale of the plaintiff's shares of stock and bales of cotton were received by the defendants' agents in New York in American funds.

It is admitted that nothing was said between the parties in reference to the manner of executing the opening order (that of the 9th April, 1919) or at any time subsequent thereto. Both parties agree that the matter of exchange was not mentioned at the time the opening order was given, or before the payment to Cutten of \$100,000 on the 19th November, 1919. Mr. Cutten says he then

App. Div.

1925.

CUTTEN
v.

BICKELL.

Ferguson, .
J.A.

App. Div.
1925.
CUTTEN
v.
BICKELL.
—
Ferguson,
J.A.

asked for exchange, and that Cashman said he was not entitled to it, and he would explain why to the plaintiff's brother, Arthur Cutten, who had opened the account for the plaintiff without the plaintiff's knowledge, and that Cashman asked him to let the matter of exchange stand till Arthur came over from Chicago, to which he agreed. On the other hand, Cashman says exchange was not mentioned till January, 1920, when the cotton deals were closed, and when the plaintiff had to his credit on this account \$162,212.20,

In these circumstances, we are asked to imply the contract stated by Mr. Tilley, because:—

1. The plaintiff admitted that he knew that prior to 1919 it was the practice as between business men dealing in commodities to ignore the rate of exchange between the United States and Canada. It is not suggested that the rate of exchange prior to 1919 exceeded 1 per cent.

2. On the 14th April, 1919, the plaintiff deposited with the defendants \$10,000 to secure his trading account, and in all statements rendered to him in reference to his stock transactions (and there were a number of such statements) he received credit for \$10,000, although, to his knowledge, the rate of exchange was about $2\frac{1}{2}$ per cent. against Canadian currency.

3. That on the 23rd October, 1919, the plaintiff made a further deposit to secure the stock account, amounting to \$7,897.78. and was, in two subsequent statements rendered, credited with that sum, although the exchange rate was at the date of deposit about 4 per cent. against Canadian currency.

4. That on the 5th November, 1919, Cutten received \$100,000 of profits out of the cotton account without asking for exchange. The latter part of the statement is disputed.

5. That on the 19th November, 1919, when exchange had risen to $4\frac{1}{2}$ per cent., Cutten paid into his cotton account \$50,000, and received credit for the full amount in subsequent statements.

6. That Cutten knew that, in all Bickell & Co.'s statements rendered to him, he was credited with all his payments in Canadian currency, that is to say, without discount.

I have carefully re-read and considered the reasons for judgment at the trial and in this Court copied in the appeal-book on the appeal to the Supreme Court of Canada, also the reasons for the judgment of the Supreme Court, in *Barthelmes v. Bickell*, 62 Can. S.C.R. 599, and it seems to me that all the circumstances relied upon by Mr. Tilley to distinguish this case from the *Barthelmes* case were present in that case, except that in this case:—

(1) Arthur Cutten admits knowledge of a practice existing

whereby, at times prior to the opening of the account, vendors and purchasers of commodities frequently and usually disregarded exchange rates as between Canada and the United States, while in the *Barthelmes* case no such admission was made.

(2) In this case there were three deposits made the better to secure the plaintiff's account, while in the *Barthelmes* case there was only one of such deposits.

(3) That, at the time of making each of such deposits, the rate of exchange was materially higher in this case than it was at the date of the deposit in the *Barthelmes* case.

The reason why such an agreement as Mr. Tilley now seeks to have us imply should be implied are so fully set forth in the opinions of the late Sir William Meredith and my brother Hodgins, and the reasons why it should not be implied are so fully stated in the reasons for judgment of Middleton, J., at the trial, and in the dissenting opinions of Mr. Justice Magee and myself in this Court,*

* In *Barthelmes v. Bickell* the following reasons for judgment were given by the trial Judge and the First Divisional Court of the Appellate Division:—

October 6, 1920. MIDDLETON, J.:— The question involved in this action is the right of the defendant firm to discharge itself from liability to the plaintiff by paying the balance due to him in Canadian funds. The plaintiff contends that he is entitled to receive the equivalent of American currency, the difference occasioned by exchange upon the amount admittedly standing to his credit, \$62,445.62, amounting to the claim put forward in this action, \$11,344.75, the debt having been paid in Canadian currency without prejudice to the contention of either party.

The defendants are brokers, carrying on business in Toronto. In January, 1918, the plaintiff began trading with them as his brokers in the purchase and sale of stock, the transactions being almost entirely upon the New York Exchange. At this time he deposited with the defendants, as security by way of margin, the sum of \$3,000 Canadian currency. The trading continued until February, 1920, when the account was closed by the payment of the amount admitted to be due by the brokers and the handing over of a few shares, the only stock purchased then remaining unrealised, reserving to the plaintiff the right to put forward this claim for exchange.

During this period, many transactions had taken place, and the course of dealing had generally been profitable to Barthelmes, although on individual transactions he had made a loss. His \$3,000 had grown to approximately \$60,000.

The way in which the business was carried on by Bickell & Co. was that they had an arrangement with Miller & Co., of New York, to purchase and sell for them upon their instructions. An account was kept with the Standard Bank at Toronto, and, when Bickell desired to make a purchase, a deposit was made to the credit of this account. On a sale being made, Miller & Co. would instruct the transfer to Bickell & Co.'s credit of any balance that might be payable. No money was sent to New York for the individual purchases, and no money was sent from New York for individual sales, and it was arranged that exchange should not be payable as between Miller & Co. and Bickell &

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,
J.A.

App. Div.
1925.
CUTTEN
v.
BICKELL.
Ferguson,
J.A.

and in the opinions of the Justices of the Supreme Court of Canada in the *Barthelmes* case, that I am relieved of attempting to restate them here. It is, I think, sufficient to say that, on the reasoning of

Co. with respect to any of their transactions. The amount involved would not be great, because, while the volume of trade would no doubt be very large, the balance ultimately payable, either by Miller to Bickell or *vice versâ*, would be comparatively small. The effect of this arrangement, however, was that the profit which might be made by one customer in respect to his individual trading would be set off against the loss payable by another, and the result would be that an arrangement, perfectly fair as between Miller & Co. and Bickell & Co., might be exceedingly unfair as between the Toronto brokers and an individual customer. If the individual customer lost on the transaction so that money would have to be sent to New York, I can see no reason why that customer should not be called upon to pay the exchange incident to the remitting of funds to New York to pay his loss. On the other hand, if a customer made on a transaction, I can see no reason why he should not receive the New York funds, with the incidental advantage by reason of the depreciation of Canadian currency.

The contention of the defendants, however, is that throughout their entire business the transactions were all carried out on the basis that money payable by their customers would be received at par in Canadian funds, and money payable by them to their customers should likewise be paid in the same funds. There is nothing in writing to indicate that this was the basis of trading between Bickell and his New York agents, and there is nothing in writing to indicate that this was the basis of trading between Bickell and his Canadian customers.

It was pointed out at an early stage of the examination of Mr. Cashman, Bickell & Co.'s manager, that to give effect to his contention would produce an extraordinary result; for, if a Toronto client might purchase and pay for New York stock in Canadian currency, and take delivery in New York, and sell there, then he would make a large profit by reason of the exchange. Mr. Cashman then said very clearly and with emphasis, and gave his reasons, that stock would not be delivered in New York without the exaction of the exchange, and that delivery would not be made upon the receipt of Canadian funds at par. After the noon adjournment, and without any explanation, he gave evidence diametrically opposed to this, and I find that it is impossible to give credence to his later statement.

In the course of dealing, monthly statements were prepared shewing the transactions, the amount of stock bought and its price, the amount of stock sold and the price realised. These figures always represented the price in New York. When, as was generally the case, there was stock on hand, the account would shew Barthelmes indebted to Bickell & Co., but this would be counterbalanced by there standing to his credit and shewn as "long" the stock on hand. These accounts always shew stock on hand having a market value in excess of the debit balance, the original \$3,000 having been absorbed in the accounting. The meaning and effect of any such statement was clearly that, upon payment by Barthelmes of the amount standing against him upon the footing of the account, he would be entitled to receive the stocks held for him; and I think it is plain that, inasmuch as this indebtedness represented an indebtedness in New York, Mr. Cashman was correct when he said that the stock would not be delivered to him unless he paid this balance in New York funds.

It is suggested that from these statements Mr. Barthelmes must have had an intimation that the basis of his trading was on the footing

the prevailing opinions in that case, I am, even with the additional facts and circumstances here disclosed, unable to imply any such contract as Mr. Tilley suggests.

of Canadian money taken at par. I do not think the statements shew this. They are the record of transactions on the New York Exchange, and correspond with bought and sold notes shewing transactions on the New York Exchange which were given to him at the time of each transaction. The fact that there was no charge for exchange upon each purchase, and no credit given for exchange on each sale, does not affect me in coming to this conclusion, because it was known that the whole transaction (if indeed any real transaction ever took place, as to which I have most serious doubt) was one effected in New York. No one dreamed that any money was sent to New York when the purchase, or supposed purchase, took place, and nothing came from New York when the sale took place. The nominal balance, where a credit balance is shewn, was in New York, available for trading there. It was expected by the customer that these transactions would result, as they did in this case, in a substantial credit balance in New York, and this balance would be arrived at by setting off one side of the account against the other.

Some conversation took place in July, 1919, with reference to the right to receive the credit balance in New York funds. There is a conflict of testimony, and I am not prepared to find upon the evidence that anything more took place than the assertion by Barthelmes of his right to have the New York funds and the denial of this right by the defendants. This was followed up by a continuance of trading without any change in the rights of the parties.

The onus of establishing any change and the adoption of a new basis of trading is upon the defendants. Their evidence is not satisfactory, and the absence of any release or discharge at that time is significant. Had the account been closed and the stock on hand been realised, there would have been a balance of about \$40,000 to the credit of Barthelmes, and I am convinced that he would not have let the exchange on that sum go by without a struggle. The delay was a mere truce, and not an abandoning of any right.

In January, 1920, it is said, but again the proof is not satisfactory, that the basis of trading between Bickell & Co. and Miller & Co. was changed, and from that time on Miller & Co. required the transactions to be on the basis of New York funds. A circular letter was said to have been sent to the firm's customers, but it is not shewn that one was sent to Barthelmes. It is said that this change of the basis of trading was announced in his hearing, but he denies this. This is a very minor matter so far as this account is concerned, as only two transactions took place subsequent to the date when this arrangement is said to have become effective. On one of these transactions Barthelmes made a small profit, and on the other a substantial loss, the net balance on the two transactions being against him to the extent of \$3,748. He is charged with \$623.08, being the exchange upon the remitting of this amount to New York.

I do not think that he can blow hot and cold; so, while I think he ought to recover exchange on balances payable to him, on the theory that the transactions were to be on the basis of New York funds, I think he should be charged with this amount. As I understand the accounts, the claim put forward is for exchange at 17 per cent. upon \$63,068, \$10,721.67, plus this \$623.08.

I would allow him exchange 17 per cent. on \$62,445.62, less \$3,000, \$59,445.62, \$10,105.73.

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,

J.A.

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,
J.A.

That brings us to the amount of the judgment.

The appellants contend that the amount should be fixed by reference to the date of the closing of each of the plaintiff's profit-

May 13, 1921. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment, dated the 6th October, 1920, which was directed to be entered by Middleton, J., after the trial before him, sitting without a jury, at Toronto, on the 1st and 2nd days of that month.

The principal facts are stated in the reasons for judgment of my brother Middleton, and it is not necessary to restate them.

At the time the transactions between the parties began, New York funds were at a premium of 1 per cent., and so continued for some time, but gradually increased until the July following; and from then on it increased more rapidly until, at the time the account was closed, it had mounted up to 17 per cent.

The transactions began on the 23rd January, 1918, when the respondent deposited with the appellants \$3,000 in Canadian funds, which forms the first item in the account; the next item is a debit of \$9,037.50 on the same day. The respondent admits that this was charged at par, although, as I have said, New York funds were then at a premium; statements (17 in all) were, from time to time, furnished by the appellants to the respondent, and in none of them is the respondent debited or credited with the premium, although all of the transactions were purchases and sales of stocks on the New York Exchange. The transactions being between residents of Canada, I think that *prima facie* the items of the account are to be taken to be expressed in terms of Canadian currency. That they were so expressed as to the two items I have mentioned is undoubted, and the reasonable conclusion is that they were intended to be, and that the respondent knew that they were, so expressed, and he was apparently content that this should be the basis of the dealing when the premium was small, as it was in the early days of the transactions.

When the premium had risen, it appears to have occurred to the respondent, as the results of the dealings were favourable to him, that he should get the benefit of the exchange.

An interview accordingly took place between the respondent and Mr. Cashman, a member of the appellant firm, in July, 1919. The parties differ somewhat as to what then occurred. This much however is clear: as there was then a considerable balance at the credit of the respondent, he desired to draw part of it and to draw it in New York funds. Cashman said that the appellants would pay only in Canadian currency, pointed out that the account was opened by a deposit in that currency, and that the arrangement between Miller & Co., their New York brokers, and them, was that no account should be taken of the premium, but that the transactions should be treated as if there were no premium on New York funds. He also said that in the future they would allow "the exchange." Whether or not Cashman also suggested that the respondent should close the account and open another on the New York basis is in dispute, Cashman alleging, and the respondent denying, that he did, although the respondent admits that Cashman said that if he closed the account he would pay the balance due to the respondent in "Canadian funds." However that may have been, the respondent continued his dealings, and the account was not closed until February, 1920.

It is not an unfair inference from this that the respondent, though reluctant, acquiesced in forgoing his claim as to the transactions before the interview of July, 1919, in consideration of the promise to allow the premium in regard to future transactions. Such a compromise of

able ventures, as shewn in exhibit No. 32, rather than by reference to the dates on which Bickell & Co. paid over the profit to Cutten as shewn in the statement in exhibit 33, which later statement the

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,

J.A.

the dispute was a reasonable one, and if made, as I think it was, is binding on the respondent.

My brother Middleton appears to have thought that Cashman made contradictory statements before and after the noon adjournment as to the funds in which settlements would be made when delivery of the stock was taken by the purchaser.

This view is based on what, with respect I think, was a misapprehension on the part of my learned brother. As I understand Cashman's testimony, what he said was that where the customer did not desire to take delivery, no account was taken of the premium, the account in substance being made up by crediting the gain and charging the loss on each transaction, but that where the customer took delivery of the shares, the payment must be made in New York funds.

Upon the whole, I am of opinion that the action fails, and I would allow the appeal with costs, and substitute for the judgment that has been entered a judgment dismissing the action with costs.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—This appeal should be dismissed. I cannot usefully add anything to the reasons of my brother Middleton, whose judgment is questioned, and those of my brother Ferguson.

The appeal seems to be brought in the hope that this Court can be induced to forget the outstanding facts that the dealings between the parties were those of principal and agent, requiring full accounting, although combined with that of borrower and lender, and were in no sense those of vendor and purchaser, giving rise to presumption of local currency, and that identity in the name of dollars in New York and Toronto does not make identity in reality, and that, however the defendants may gloss to themselves, as excuse for some extraordinary evidence, the dealings by cross-entries in New York, the fact remains that they were in effect daily or hourly by those cross-entries receiving and allowing differences in exchange on the sums involved. The so-called bank account in Toronto was really nothing more than a security account, and for all the bearing it has on the questions involved might as well have been based on a deposit of bullion, wheat, or shares.

The profits on the plaintiff's dealings were of course the result of gradual accumulations spread over two years, and the rate of exchange varied during this period. But these profits were, as they grew, invested in other purchases, and therefore it is not necessary to inquire into the various rates prevailing except when the account was required to be closed out. The correctness of the rate adopted by the learned trial Judge for that date had not been questioned. Incidentally the fact that the profits arising from time to time were reinvested in New York without question, as New York funds, shews that the plaintiff was so entitled to them.

To give effect to the defendants' contention requires two extraordinary conclusions. One is that, although both parties say these were real transactions with real purchases and sales of stock in New York, this principal and his client were dealing in Toronto upon a mythical basis having no actuality in market figures, always removed from the real prices by the rate of exchange. Another is that either the defendants' right to keep the exchange rate, amounting to nearly 1000, on the plaintiff's profits, was dependent on the plaintiff's will,

App. Div. learned trial Judge adopted in awarding judgment; and the
1925. amount involved is substantial, namely, \$10,901.56.

CUTTEN
v.
BICKELL.
Ferguson,
J.A.

It is conceded that Bickell & Co.'s agents in New York were not instructed to keep or expected to keep and did not keep a

or it must have been an implied part of the bargain that the plaintiff could never call for the stocks he bought by paying the defendants the amount owing on them. If he could call for the stocks, then all he had to do to prevent the defendants retaining the \$12,000 was to instruct them to purchase stocks in New York with the full amount at his credit, and then call for them to pay up, and close the account when no balance was owing to him. Such an agreement is certainly not proved, and is more than I can find implied.

HODGINS, J.A.:—My conclusion, after reading the evidence and exhibits, is against the respondent's claim.

Before the respondent began his operations, the appellants and Miller & Co., New York brokers, arranged a method by which Canadian speculators might deal on the New York market in stocks on margin under circumstances which would obviate the necessity of their remitting money between Toronto and New York or *vice versa*. That method consisted in the maintaining by Miller & Co. of a deposit in the Standard Bank in Toronto consisting of a large amount of money. The results of the purchases and sales of stock in New York were communicated by Miller & Co. to the appellants, who were then authorised by Miller & Co. to draw for the benefit of their clients upon the funds in the Standard Bank, paying in this way their Canadian customers any profits that had been made in trade in New York. This also involved the advantage of enabling buying and selling to be done by clients in Toronto upon the credit of the appellants in New York and not upon their own individual credit, and also upon the basis of Canadian dollars, any losses being charged to the appellants. When this arrangement was made, apparently the difference in exchange was nil or only trifling. It is said to have been 1 per cent. when the respondent's transactions began.

The rise in exchange has given occasion for this controversy. Obviously, if it were not an element, the business arrangement to which I have referred would have worked smoothly and without undue advantage or disadvantage to any party who might come within its scope or to the two stockbroking firms. But, with its appreciation, it became an object to insist upon the foreign locus of the actual buying being regarded as governing the situation.

It is manifest that, so long as the operations in New York were conducted upon the appellants' credit there with Miller & Co., under the arrangement I have mentioned, the profits and losses made or incurred in dollars would precisely correspond with similar transactions in Toronto upon stocks listed here, and that exchange would not be an element. In other words, but for the exchange, a profit or loss of \$500 in New York would be exactly the same as a profit or loss of \$500 here, and the deposit in Toronto by Miller & Co. and the furnishing by the appellants of New York credit enabled exchange to be eliminated as between the brokers until it became too expensive for one of them.

The real difficulty occurs in this case because both parties have to admit, and indeed to assert, that the transactions in New York were actual transactions, and from this the result would seem logically to follow that the respondent would be entitled to ask for a remittance from New York of his profits, or to require the delivery of the stocks

separate account for each of Bickell & Co.'s clients, and, as was to be expected, Miller & Co., in accounting to Bickell & Co., set off, against losses on one trade made on Bickell & Co.'s account, gains

that he had bought. But this particular outcome of the dealings was no part of the arrangement made. It was not consistent with it, and so long as the parties operated under it the only consequence anticipated and provided for was the ultimate balancing of losses and gains in trading and their settlement in Canadian funds, I see no illegality in an arrangement made to get away from the fluctuations of exchange, and based on the tacit understanding that the legal rights of both parties should remain in abeyance meanwhile, subject to their exercise at any time, upon the terms that when asserted the party claiming them should do so subject to the exigencies of the exchange situation and to the then condition of the accounts between the client and broker. It was therefore always the option of the respondent, upon notice to his broker, that he preferred to deal outside of the pending arrangement, and on his individual credit, to operate thenceforth on his own account. If he then demanded his profits, he must do so upon the footing of his trading bargain; but if he, instead, demanded delivery of his stocks, he would be bound to acquire them upon terms not controlled by the plan upon which he had been operating. In short, that payment would be one not contemplated by the arrangement, and it could only be exercised upon compliance with the law upon the subject, namely, payment in the currency of the country in which the stocks were bought. I do not find that the respondent elected to go outside the arrangement until later on, towards the end of his operations.

Up to that time, I think the proper conclusion is that he regarded his deposit of Canadian money with the Toronto brokers as entitling him in his New York transactions to the benefit of the arrangement made between the brokers, and that he is now endeavouring to apply to that situation something which was not contemplated by any of the parties.

When the question was raised in July, 1919, he did not insist upon closing his account and opening another on the basis of American funds, but went on with the knowledge of the view taken by the appellants of his inclusion in their brokers' arrangement and of its scope. Looking at the matter in another way, the purchase of the stocks was to be made abroad, but in what currency were they to be paid for, Canadian or United States money? If nothing appeared but that fact, then *prima facie* it would be in that of the country where it was payable. But this may be changed by evidence of intention looking the other way. The parties lived and did business in Toronto; the accounts were kept there; the deposit made by Miller & Co. in Toronto was in Canadian money, an unusual and unnecessary thing if all payments were to be made in New York or in United States money. The sole amount contributed by the respondent was also in Canadian money, and the arrangement made was only valuable if it facilitated doing away with the fluctuations of exchange and with the remittance of money to and from New York. All the accounts sent to the respondent deal with the transactions as accountable in local funds.

These considerations lead me to the definite opinion that the parties contemplated certain transactions to be carried on and completed as if they had all been done in this Province, and that the respondent did not take steps to see that this intention was effectively changed with the consent of the appellants or by notice to them.

Under these circumstances I have come to the conclusion that the

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,
J.A.

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,
J.A.

made on other trades. It was on argument conceded that, as between themselves, the brokers accounted daily. In these circumstances, I think it must be held that Bickell & Co. each day or each

appellants should succeed, and that judgment should be entered for them allowing the appeal and dismissing the action, both with costs.

FERGUSON, J.A.:—Appeal by the defendants from a judgment of Middleton, J., awarding the plaintiff \$10,105.73, as being due to the plaintiff on an accounting by the defendants as the plaintiff's brokers.

On the 23rd June, 1918, the plaintiff employed the defendants as his brokers to purchase for him, on the New York Stock Exchange, 100 shares of United States Steel, and as security for the liability which the defendants thus undertook, he deposited with the defendants the sum of \$3,000 Canadian funds. The account thus opened continued down to February, 1920, and the deposit thus made formed the basis on which the plaintiff, without further payment, through the defendants, traded in stocks in New York and commodities in Chicago, so as to require the financing and handling of upwards of \$1,800,000.

In pursuance of their employment, the defendants employed agents in New York and Chicago, who purchased the securities and commodities and pledged them the purchase-moneys, and in turn sold the stock and commodities on these exchanges, and received the purchase-moneys.

The commissions due to the defendants and their sub-agents were added to the purchase-price or deducted from the proceeds of sale, all dealings and transactions being in New York funds.

As a result of the plaintiff's trading, the defendants admitted that on the 7th February, 1920, they had standing to his credit the sum of \$62,445.62. The plaintiff demanded payment of this sum in American funds, then at a premium of 17 per cent. The defendants contended that they were liable to pay in Canadian funds only, and gave the plaintiff a cheque for the amount payable in Canadian funds, which the plaintiff accepted on account, and he now claims the difference represented by the premium, and it is for this that he has recovered judgment. The defendants contend:—

(1) That because the account was opened by a cheque for \$3,000 payable in Canadian funds, and in the statements rendered from time to time the cheque was credited at its face value without any deduction to represent the premium on New York funds on the date of payment, which at that time was 1 per cent., it should be inferred and found that the parties intended and agreed that the accounting between them and all payments that they were called upon to make should be on the basis of Canadian funds.

(2) That in July, 1918, the plaintiff had been advised that the defendants contended that they were only liable to pay on the basis of Canadian funds, and that he then expressly agreed to accept an accounting on that basis, or, by his conduct in continuing to trade after knowledge of such a claim on the part of the defendants, is now estopped from claiming payment in New York funds.

(3) That the defendants, acting in the usual course of business and according to well known customs and usages between Toronto brokers and their New York correspondents, entered into an agreement with their New York correspondents, Miller & Co., that all payments from one to the other should be made in Canadian funds; that such an arrangement was reasonable, and being reasonable and in accordance with custom and usage, the defendants had implied authority to make and did make, on behalf of the plaintiff, such an arrangement with their New York correspondents, and that he is bound thereby.

few days received from Miller & Co., in New York funds, payment of any profit the plaintiff had made in New York, rather than that the plaintiff's profits remained in New York until such day as the

The learned trial Judge found all these issues in favour of the plaintiff.

The conclusion of the trial Judge as to whether there was in July, 1918, an express agreement, turns on the credit of the witnesses as to what was said and done at that time, and cannot, I think, be disturbed, and the finding as to what was said also disposes of the defence of estoppel.

Unless we can and should find that it was understood by both parties that the plaintiff was not to have the right to call upon the defendants to make deliveries of the stocks and commodities purchased, and that he was not bound to indemnify them against the purchases which he instructed, and which they in turn instructed their New York agents to make, I cannot see how it can be argued that the plaintiff was not at all times liable to pay the purchase-price in New York funds. If he were, it seems to me that he was entitled to be paid, in New York funds, the sums realised and received by his agents in New York.

I cannot think that the fact that the defendants did not in their statements make a charge of \$30 to represent the premium on the sum of \$3,000 which the defendants deposited as security is a circumstance sufficient as a foundation on which to base a finding that the defendants agreed to accept from the plaintiff Canadian funds at par in payment of all purchases which the defendants and their correspondents made on his instructions and for his account. In fact, the evidence of the witness Cashman is that, had the plaintiff called for delivery, New York funds would have been demanded. Nor do I think that it can be inferred that the plaintiff agreed or intended to agree that the profits made by him on his transactions in New York for the making of which New York funds were employed should be payable in Canadian funds, the effect of such an arrangement being to allow the defendants to use for their own benefit, or for the benefit of their other clients, the premium on New York funds realised from the plaintiff's transactions.

The agreement between the defendants and their New York correspondents, as deposed to by Cashman and Bickell, cannot, I think, be interpreted to mean that the New York correspondents agreed to accept payment in Canadian funds for the stocks they purchased on the instructions from the defendants.

On my reading of the evidence as to the terms of this agreement, it was intended to provide and there was in fact arranged merely a simple and handy system of accounting adopted between these two firms, which was not intended to affect the liability of one to pay or the right of the other to receive the ultimate balance in New York funds; certainly the agreement does not purport to define or affect rights and liabilities of the customers or clients of either firm or to bind them to accept payment in funds other than the currency of the place where the actual transactions were entered into.

Mr. Johnston urged that the defendants had not made any profit on exchange. This is probably true, but it seems clear that, if they did not, they allowed their other clients or customers to have the benefit of and trade in New York on the moneys the plaintiff had there accumulated.

This seems to me to be a clear breach of the defendants' duty to the plaintiff, and, if, as a result of such a breach of duty and disregard of the plaintiff's rights, they suffered loss, their loss cannot, I think, be fastened upon the plaintiff.

App. Div.

1925.

CUTTEN

v.

BICKELL.

Ferguson,

J.A.

App. Div.

1925.

CUTTEN
v.

BICKELL.

Ferguson,
J.A.

plaintiff instructed Bickell & Co. to bring them home or until Bickell & Co. paid them over to the plaintiff.

The plaintiff did not give any instruction to Bickell & Co. to keep his profits in New York until he desired to draw them, and

There is no evidence on which it can be found that the plaintiff knew, approved, and expressly agreed to be bound by and accept settlement on the basis of or by reference to an agreement between the defendants and their New York correspondents, Miller & Co. But Mr. Johnston urged that the defendants had implied authority to bind the plaintiff by such an agreement, on the theory or hypothesis that they had authority to do anything that was reasonable to be done in carrying out the plaintiff's instructions to buy and sell stocks in New York or commodities in Chicago.

The agreement may have been reasonable and according to custom and usage between brokers as a system of accounting affecting only themselves, but it seems to me to be quite another thing to say or to find that it is a reasonable agreement as between the principals or clients of the brokers and those with whom they contract, or between the numerous clients of the brokerage firm; or that it is a usual or customary agreement for a client to make with his brokers, or for brokers to make for their clients with persons with whom they deal, or as between their several clients.

In my opinion, the agreement does not affect and was not intended to affect the clients of either Bickell & Co. or Miller & Co.; and, if it was so intended, it was not a reasonable agreement or in accordance with the custom of the place, market, or business in which these brokers were employed; and, as the effect of such an agreement would be to allow the brokers or their less fortunate clients to benefit to the extent of the premium on New York funds at the expense of the plaintiff, and to place the brokers in a position where their interest would conflict with their duty, such an agreement is not reasonable or within the meaning of the rule relied upon by the appellants. See *Robinson v. Mollett*, L.R. 7 H.L. 802, at p. 818, where Brett, J., states the rule as follows:—

“When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void . . . The question, therefore, I submit, in the present case, is, whether the alleged custom does not pass beyond due freedom and degenerate into injustice. If the custom which exists in fact is not unjust, as against principals ignorant of it, your Lordships will uphold it, however much it departs from the rules hitherto recognised by the Courts as applicable to the contract of employment between principals and brokers, but if it so far breaks from those rules as to be unjust to such principals in such contract, your Lordships will pronounce it to be void as a custom.”

I am of opinion that the judgment appealed from is right, and should be affirmed. I would dismiss the appeal with costs.

See, also, *Maloolf v. Bickell* (1919), 59 Can. S.C.R. 599; and, in the Ontario Courts (1917-18), 13 O.W.N. 4, 14 O.W.N. 289.

it seems to me that in such circumstances it was Bickell & Co.'s duty to reduce them into possession and to transfer them to their own custody in Toronto promptly, and that by a system of cross-entries between themselves and their sub-agents they did this, and therefore should not be charged exchange on the basis that they had in fact retained the plaintiff's profits in New York till the date they were paid over to Cutten by Bickell & Co.

I would, for these reasons, allow the appeal in part, and direct that, instead of the amount awarded, the plaintiff recover against the defendants the sum of \$11,613.45 and interest from the 16th January, 1920.

Though the plaintiff had substantial success at the trial, the learned trial Judge deprived him of costs because he was unsuccessful in respect of a claim for an allowance of about \$5,000 on interest account. By this appeal the defendants made a substantial gain, but have failed in respect of a very substantial claim or part of their appeal. We cannot change the award of the trial Judge as to costs; and, in such circumstances, I think the logical and just course is to deprive the defendants of their costs of appeal by making no order as to costs.

Appeal allowed in part, without costs.

[APPELLATE DIVISION.]

RE HAIG.

1924.

Will—Construction—Devise to Infant Nephew for Life and at his Death to his Sons and Daughters—Devise over in Event of Nephew Having no Sons or Daughters—Estate Tail—Bequest of Personalty—Charge on Estate of Nephew of Sum of Money to "Help Pay Legacies."

March 14.

1925.

April 6.

A testator devised land to his nephew H. "for his natural lifetime. At his death the said property will go to his sons and daughters. In the event of him . . . not having any sons or daughters the said property will revert to my nephews at the death of the said H. absolutely. . . . The household goods . . . and also the farming utensils and the machinery goes with the place. The said H. has to pay to the executors the sum of \$5,000 for this property to help pay the legacies mentioned in this will." It was also provided in the will that the executors should have full control over the land devised until H. should attain his majority, provided "he is thrifty and industrious. If the executors do not think he is steady enough to manage the place at 21 years he does not get full possession till he is 25 years." H. had no son or daughter at the date of the will nor at the

App. Div.
1925.
CUTTEN
v.
BICKELL.
Ferguson,
J.A.

1924-25.

RE HAIG.

date of the death of the testator, and was still an infant, when this case was before the Court:—

Held (HODGINS, J.A., dissenting), reversing the decision of ORDE, J., who interpreted the will upon a summary application by originating notice, that the testator used the words "sons or daughters" as words of limitation, and that H. took an estate tail charged with the payment of \$5,000.

Wild's Case (1599), 6 Rep. 16b, applied and followed.

Judgment of ORDE, J., reversed.

Per HODGINS, J.A., and ORDE, J.:—H. took a life-estate in the land and in the household goods, farming utensils and machinery.

Review of the authorities.

Chandler v. Gibson (1901), 2 O.L.R. 442, and *Grant v. Fuller* (1902), 33 Can. S. C. R. 34, specially referred to.

Several other questions raised by the originating notice were determined by ORDE, J., as set out in his judgment, *infra*.

APPLICATION by the executors of the will of Andrew Clark Haig, deceased, for an order determining a number of questions arising out of the terms of the will.

December 5, 1923. The application was heard by ORDE, J., in the Weekly Court, Toronto.

C. W. Kerr, for the executors.

Lyle Ramsey, for the Official Guardian, representing Alexander Clark Haig, an infant nephew of the testator.

John E. Kerr, for the other infant nephews of the deceased and any unborn beneficiaries.

March 14, 1924. ORDE, J.:—The testator, by a very unskillfully worded and somewhat incoherent will, devised certain lands in the following manner:—

"To my nephew Alexander Clark Haig" (here follows a description of the lands) "for his natural lifetime. At his death the said property will go to his sons and daughters. In the event of him the said Alexander Clark Haig not having any sons or daughters the said property will revert to my nephews at the death of the said Alexander Clark Haig absolutely."

This is followed by certain provisions as to the working of the farm during the infancy of Alexander Clark Haig, and then these provisions: "The household goods that is the things that is in the house and also the farming utensils and the machinery goes with the place. The said Alexander Clark Haig has to pay to the executors the sum of \$5,000 for this property to help pay the legacies mentioned in this will."

It is urged on behalf of Alexander Clark Haig (whom I shall refer to as Haig) that the will gives him an estate tail in the lands

under the rule in *Wild's Case* (1599) 6 Rep. 16b. If *Wild's Case* were otherwise applicable, the words "sons and daughters" would doubtless be held to mean "children," but there is no room here to apply the rule at all. The word "children" is not *primâ facie* a word of limitation; but, in order to give effect to an intention which might otherwise be defeated, where there was a devise to A. and his children, there being no children of A. at the time of the devise, it was held that, as what on its face would create a joint tenancy could not be deemed to have been the testator's intention, the words "and his children" must be construed as words of limitation so as to give A. an estate tail. And there have been exceptional cases where the language of the will has been such that the Court has extended the rule, even where there were children of A. living at the date of the will. But there is no authority for the suggestion that the rule in *Wild's Case* applies to successive limitations, such as a gift to A. for his life and after his death to his children, so as to enlarge A.'s life-estate into an estate tail. See *In re Jones*, [1910] 1 Ch. 167, at p. 175.

It was further argued that the language of the gift over was sufficient to enlarge the life-estate into an estate tail. Many of the cases in which a life-estate has been enlarged into an estate tail, because of the wording of the gift over, must be read with regard to the fact that they were decided before what is now sec. 33 of the Wills Act, R.S.O. 1914, ch. 120, came into force. The gift over "in the event of him the said Alexander Clark Haig not having any sons or daughters" cannot, upon any rule of construction or by anything in the language, be deemed to refer to an indefinite failure of issue. The words mean exactly what they say and nothing more.

In *Chandler v. Gibson* (1901), 2 O.L.R. 442, the gift over was in the words, "but should he have no issue then to be equally divided among all my grandsons," and it was held that there was no implication which could enlarge the earlier life-estate into an estate tail or which could defeat the rights of the life-tenant's children to take the fee simple as purchasers. See also *Re Sharon and Stuart* (1906), 12 O.L.R. 605, and *Grant v. Fuller* (1902), 33 Can. S.C.R. 34. The last case is substantially on all fours with this.

The words "The said Alexander Clark Haig has to pay to the executors the sum of \$5,000 for this property to help pay the legacies mentioned in this will" are not easy to understand, in view of the fact that the lands and household goods, farming utensils and machinery, are valued respectively at \$7,650 and

Orde, J.

1924.

RE HAIG.

Orde, J. \$258 or \$7,908 in all. Did the testator seriously intend that this nephew, a boy of 16 when the will was made, should pay \$5,000 for a mere life-interest in this property, and being still unmarried run the risk of its passing at any time to the other nephews of the testator? I cannot think that the testator used the word "property" in the limited sense (of which it is of course capable) of a mere life-estate. The only reasonable meaning and effect that I can give to this sentence is to treat it as an alternative gift or provision entitling Haig to purchase the absolute interest in the property mentioned. It gives him the option of acquiring the fee simple in the lands, and the absolute interest in the chattels already mentioned, by paying \$5,000 to the executors, instead of taking a mere life-estate without payment.

As to when Haig, who is still an infant, must elect, I am of the opinion, having regard to the whole will and to the provision for working the farm during his infancy, that his election may be postponed until after he comes of age. The general rule when an infant has to elect is for the Court to elect for him, after directing an inquiry as to which course is more beneficial. See Jarman on Wills, 6th ed., p. 554; but the Court may direct that the election be postponed: *Boughton v. Boughton* (1750), 2 Ves. Sr. 12.

With the foregoing expression of my opinion, I now proceed to answer *seriatim* the several questions submitted on the motion.

1. Haig takes a life-estate in the lands devised to him, with remainder in fee to any sons or daughters who may be born to him. There being no condition as to survivorship, the estate in remainder will, upon the birth of a child, vest immediately in that child; but, the gift being to a class and being subject to a previous life-estate, all children afterwards born to the life-tenant will also share, the vested shares of those already born being cut down so as to let in the subsequent children. See Hawkins on Wills, 2nd ed., pp. 94 *et seq.* There being an immediate vesting of the remainder in the first child born to Haig, the gift over to the nephews can thereafter never take effect, even if none of Haig's children should survive him. All those nephews of the testator (including Haig himself) who survived the testator are entitled by way of remainder to an estate in fee contingent upon Haig's dying without having had any children.

2, 3, and 4. The direction as to Haig paying \$5,000 for the property does not create a charge upon those estates which are limited as declared by the preceding answer or upon any of them. It operates only as an option given to Haig to purchase the fee simple. If Haig should exercise that option, then the subject-matter

of the gift would immediately become charged with the sum payable by him, not under the will, but under the ordinary principles governing a vendor's lien. The election to purchase will of course at once divest Haig's children and the other nephews of the testator of all estate or interest in the lands and chattels mentioned.

Orde, J.

1924.

RE HAIG.

5. I am asked if the executors should register a caution under the Devolution of Estates Act before the expiry of three years from the testator's death in order to preserve their rights as to the \$5,000 above mentioned. Registration of the will and of the order taken out on this motion ought to be sufficient for this purpose, but there is nothing to prevent the executors from registering a caution if they think there is any danger.

6 and 7. Haig is entitled during infancy to work the lands, but he is not bound to do so. If he does not, the executors are to control the lands until he comes of age and has had an opportunity to elect whether he will take the life-estate free from any obligation or will purchase the fee simple for \$5,000, and the executors must, as prudent administrators, derive what revenue they can from the lands by leasing them or otherwise dealing with them.

8. The provision as to the postponement of Haig's enjoyment until he is 25, "if the executors do not think he is steady enough to manage the place at 21 years," is, in my judgment, having regard to other provisions of the will, too uncertain, and cannot cut down Haig's rights or interest, or prevent him from enjoying and exercising them on attaining 21.

9, 10, and 11. The gift of the household goods, farming utensils and machinery, automatically follows the destination of the lands, whatever that may ultimately be, according to Haig's election to purchase or otherwise. If he elects to purchase, then the chattels would necessarily be charged with the payment of the purchase-money as well as the lands.

12. The provision in the will as to the sale of the horses, cattle, and other stock, is a little obscure. I think, however, that it could not have been intended that the executors should hold the stock until Haig is 21, if he does not work the farm during infancy. As he has not seen fit to work the farm since the testator's death, and more than a year has elapsed since then, I think the executors are entitled to sell the stock at once. Out of the proceeds they must set aside the sum of \$750 for Haig's benefit, and that sum ought to be paid into court to remain until Haig reaches 21.

13 and 14. The concluding words of the will are intended to

Orde, J.
1924.
RE HAIG.

provide for payment, out of the residue of the estate, of all the succession duties. I do not think they constitute a gift to the Government of any further residue, if a surplus should be left after satisfying the succession duties. In that event there will be an intestacy as to the surplus. If the residue is not sufficient to pay all the succession duties, then, as such duties are primarily payable by the beneficiaries themselves, each beneficiary must make up the proportionate difference out of his legacy or devise. There may be difficulty in fixing the duties because of the postponement of the exercise of Haig's right of purchase until he is of age, but that will have to be worked out between the executors and the Succession Duty Office.

15. The question whether the \$5,000 which Haig must pay if he elects to purchase bears interest is mentioned in several of the questions, but it is simpler to deal with it separately. The will itself throws no direct light upon the point; but, as during his infancy the life-estate, apart from the effect of the Devolution of Estates Act, is vested in Haig, and he is consequently entitled to the rents and profits, his election to purchase the fee simple, if he so elects, must, I think, be deemed to relate back to a date one year after the testator's death, and I think the \$5,000 ought to carry interest at 5 per cent. per annum from that date.

There will be a declaratory order in accordance with the foregoing answers; the costs of all parties, those of the executors as between solicitor and client, to be paid out of the estate.

The executors appealed from the order of ORDE, J.

May 21 and 22, 1924. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

The parties were represented respectively by the counsel who appeared in the Court below.

The arguments and the authorities cited are sufficiently referred to in the judgments.

April 6, 1925. MULOCK, C.J.O.:—Under Rule 600 the executors and trustees of the will of A. C. Haig, deceased, apply to the Court for its construction of the testator's will, and in support of the application have filed the affidavit of Andrew Haig, one of the executors, which is to the following effect: that the testator died on the 8th May, 1923; that his personal estate was valued by the executors at the sum of \$20,681.11, and his real estate at the sum of \$7,650; that Alexander Clark Haig, the testator's nephew, was,

at the time of the testator's death, under 17 years of age and unmarried; that the testator left him surviving other nephews; that, at the time of his death, his household goods, farming utensils and machinery, were worth \$258, and his farm-stock \$1,545; that on attaining the age of 21 years the said nephew, Alexander Clark Haig, would be entitled to be paid, out of money in court arising from his father's estate, a sum exceeding \$5,000; that the legacies given by the testator amounted to \$16,400; that the succession duties would amount to about \$2,000; and that the said legacies cannot be paid in full "until the said sum of \$5,000 is paid to me and my co-executors."

The following are the provisions of the will out of which arise the questions submitted to us:—

"I will devise and bequeath all my real estate of which I may die possessed in the manner following that is to say to my nephew Alexander Clark Haig son of the late Irwin D. Haig my brother . . . for his natural lifetime. At his death the said property will go to his sons and daughters. In the event of him the said Alexander Clark Haig not having any sons or daughters the said property will revert to my nephews at the death of the said Alexander Clark Haig absolutely. The executors to have control over this property until the said Alexander Clark Haig attains the age of 21 years providing he is thrifty and industrious. If the executors do not think he is steady enough to manage the place at 21 years he does not get full possession until he is 25 years. The executors will then give him full possession of the property mentioned" (referring to the said lands.) "The household goods that is the things that is in the house and also the farming utensils and machinery goes with the place. The said Alexander Clark Haig has to pay to the executors the sum of \$5,000 for this property to help pay the legacies mentioned in this will. If the said Alexander Clark Haig wants to work the place until he is 21 years he is to have the privilege to do so. If he works it to the satisfaction of the executors he is to get the stock that is horses cattle and other stock that is on the farm at my death to work with, that is the place. If he goes on the place and works satisfactory and does what is right until he is 21 years the said Alexander Clark Haig will then at the age of 21 pay to the executors \$750 as soon after he is 21 as he is able. If he does not go on and work the place until he is 21 years the stock is to be sold and the said Alexander Clark Haig is to get from the executors the sum of \$750 to start his farming as soon as the executors think he is steady enough to manage the place. I will and be-

App. Div.

1925.

RE HAIG.

Mulock,
C.J.O.

App. Div. 1925.
RE HAIG.
Mulock,
C.J.O.

queath to my sisters" (he here names certain legatees to whom he bequeaths in all the sum of \$16,400.) "The balance of the estate after all the legacies are paid to go to the Government to pay succession duties as far as it will go."

By this will the testator gives all his real estate to the said nephew "for his natural life." At his death the said property will go to his sons and daughters. In the event of said Alexander Clark Haig not having any sons or daughters the property will "revert to my nephews," etc. The nephew had no son or daughter at the date of the will nor at the date of the death of the testator. It is clear, I think, that the testator used the words "sons or daughters" as words of limitation; and, applying the rule in *Wild's Case*, 6 Rep. 16*b*, I am of opinion that the nephew took an estate tail. Discussing that rule in *Clifford v. Brooke* (1876), 10 Ir. R.C.L. 179, at p. 184, quoting from Hale in 1 Vint. 225, White-side, C.J., says: "If A devises his lands to B, and to his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail; there such words shall be taken as words of limitation; *scil.* as much as children or issues of his body." The authority of that case has never been impeached. . . . To do away with the effect of words of limitation there must be an expression of a distinctly contrary intention. The mere expression of a motive apparently inconsistent therewith cannot do away with the effect of words of limitation."

In *Bowen v. Lewis* (1884), 9 App. Cas. 890, at p. 917, Lord Blackburn says that "in *Roddy v. Fitzgerald*, 6 H.L.C. 823 . . . the rule is established that if a testator does express an intention that A. shall have the estate for life, and on the failure of the heirs of the body of A. the estate shall go over, the effect is that an estate tail is given to A. by necessary implication, as otherwise all the subsequent limitations would be too remote."

The majority of the Court in *Bowen v. Lewis*, taking a similar view, refused to give effect to the words of the testator, that on failure of the heirs of the body of A. the estate shall go over; and I think we should be governed by that decision, and hold that the other nephews of the testator do not take in the event of the nephew Alexander Clark Haig dying not leaving any sons or daughters.

In connection with the devise to his nephew Alexander Clark Haig the testator says, "The said Alexander Clark Haig has to pay to the executors the sum of \$5,000 for this property to help pay the legacies." This means that the payment of \$5,000 is

charged upon the estate devised to the nephew. Thus, his fee tail in the land is subject to the payment of \$5,000. App. Div.
1925.

The judgment appealed from is to be varied by declaring that Alexander Clark Haig took an estate in the lands in fee tail charged with the payment of \$5,000. RE HAIG.
Mulock,
C.J.O.

All parties to the appeal should be paid their costs out of the estate, those of the executors as between solicitor and client.

MAGEE, J.A.:—I agree with my Lord that the testator's nephew Alexander Clark Haig takes an estate tail.

I am of opinion that the testator intended his namesake nephew to have an estate in the farm which would descend to his issue, and for which it would not be too much to be charged with the payment of \$5,000, and that it is not inconsistent with the will that the interests of the nephew and his sons and daughters should be combined, interpreting the latter as the heirs of his body, and so giving him an estate tail. The mention of his enjoyment for life and of sons and daughters, instead of children or issue, is not, on the authorities, inconsistent with an estate tail, and the gift over is not, under our statute (the Wills Act, sec. 33), inconsistent, and the direction to pay \$5,000 indicates an intention that the nephew's estate is not limited to an estate dependent on failure of issue at his death.

It could not have been the testator's intention that the payment of a possible deficiency of \$5,000 to make his estate sufficient for the payment of legacies should depend on the election of Alexander Clark Haig to pay \$5,000 or not at his option, an election which he certainly would not make in favour of payment for a mere life-estate—and the direction to pay is imperative and not given as a choice. I may refer to *Bowen v. Lewis*, 9 App. Cas. 890, and *In re Thomas, Vivian v. Vivian*, [1920] 1 Ch. 515.

The estate tail is, of course, subject to the provisions as to management during Alexander Clark Haig's minority; and, in my view, the full sum of \$5,000 is payable by him, and not the mere actual deficiency necessary to pay legacies.

FERGUSON and SMITH, J.J.A., agreed with MULOCK, C.J.O.

HODGINS, J.A.:—The will is very ill-drawn, and it is hard to make out an intention so coherently expressed as to afford a clear clue to its meaning. The Court must do its best to give effect to what can properly be spelled out from the language used.

App. Div.

1925.

RE HAIG.

Hodgins.
J.A.

The testator made his will on the 16th October, 1922, and died on the 8th May, 1923.

The devise which creates the difficulty deals with four parcels of land and is as follows (quoting the will as above).

The legacies amount to \$16,500. The personal estate is sworn at \$20,681.11, including \$258 in household goods, farming utensils and machinery, and \$1,545 live stock. At the date of the will the nephew was 15 or 16 years of age, and was not married.

The rule in *Wild's Case*, 6 Rep. 16*b*, was relied on as enabling the Court to deduce from the language used an estate tail in the nephew A. C. Haig, instead of a life-estate.

That case decides that where there is a gift to one and his children and there are no children at the date of the will an estate tail vests in the parent.

As there were no children in *esse* when this will was made, that case would *primâ facie* apply, provided the words "sons and daughters" are to be construed as equivalent to the word "children" in the sense of issue. Care must be taken in applying this rule not to go beyond what has been laid down, during the 300 years since it was enunciated, as its correct limits.

It can and should be disregarded where the testator's intention would be defeated by its application or where the context indicates a different purpose. Otherwise it is not to be departed from, nor should it be extended. It is a rule of construction: *Clifford v. Koe* (1880), 5 App. Cas. 447.

The language of this will is somewhat like that in *Grieve v. Grieve* (1867), L.R. 4 Eq. 180, and the decision there was against an estate tail, but the reason given has not received the approval of the House of Lords: *Clifford v. Koe* (*ante*).

The testator here gave his nephew A. C. Haig, then under age, a life-estate in so many words, and provided for the management of the farm during his minority. His idea and wish is evident that his nephew shall manage the place before and after 21, and the testator directs that if he does not do so before he attains 21, the live stock are to be sold, and he is to get one-half of their value to start him on the farm when he "is steady enough to manage the place." The question is what estate he has given him in the lands themselves.

In *In re Jones*, [1910] 1 Ch. 167, Joyce, J., held that *Wild's Case* did not apply "where the gift or devise to the children would without reference to the rule be a gift in succession to, and not concurrently with, their parent." What is meant by that is shewn by Lord Selborne, L.C., in *Clifford v. Koe* (*ante*), where he says

(5 App. Cas. at p. 458): "In *Wild's Case* the very point which the rule settles is that there is succession, not that there is no succession of interests: that in a case where children are not in existence so as to take concurrently with their parent, the gift is a gift of estates tail in which the children can take and will take only by way of succession to their parent."

App. Div.
1925.
RE HAIG.
Hodgins,
J.A.

In other words, where the will by force of its words creates estates in succession there is no need for the convention established by *Wild's Case*, and it does not apply. In *Seale v. Barter* (1801), 2 B. & P. 485, it is said (p. 495):—

"If he meant to give his estate to his son and his posterity generally, it is an estate tail: on the other hand, if he meant to give it first to his son, and afterwards to select the sons and daughters of his son in order to give the estate to them, the son took only an estate for life."

In *Ginger v. White* (1742), Willes 348, 353, Willes, L.C.J., makes this observation on *Wild's Case*:—

"If a devise be to A. and his children, if there be no children then in being, it gives an estate tail, because the devise is in words *de presenti*; and there being no children in being they must take by way of limitation: but if a devise be to A. *and after his decease* to his children, A. has only an estate for life, because then the words plainly shew that the children were intended to take by way of remainder."

In Lord Watson's speech in *Clifford v. Koe* (*ante*), where the devise was "to my eldest son H. W. and to his children lawfully begotten," he says (5 App. Cas. at p. 471) that these words convey an estate tail, and that in the context of the will there were no words to "evinced his (the testator's) intention to limit his eldest son's interest to a life-estate, with so much clearness that they must be admitted to control the antecedent words of disposition."

I have read the cases cited and many others, and think the case of *Bowen v. Lewis*, 9 App. Cas. 890, throws more light upon this case than any other that I have found. The will there said:—

"I give and devise unto my eldest son Thomas all my real and freehold estate . . . during the term of his natural life, and after his decease to his legitimate child or children (if there be any); but if he dies without issue my will is it may go unto my other son William during the term of his natural life, and afterwards to his legitimate child or children (if any); but if he should likewise die without issue my will is it may go to my daughter Mary and to her heirs and assigns for ever."

Earl Cairns and Lords Blackburn and FitzGerald held that

App. Div.

1925.

RE HAIG.

Hodgins,
J.A.

Thomas took an estate tail in the realty; Lord Selborne, L.C., and Lord Bramwell, that Thomas took an estate for life, with remainder to his children (if any) in fee as purchasers.

While the Judges differed on the construction of the will, nevertheless they were all agreed upon the law so far as it affects the case in hand. The opinion of the majority was based mainly (although there were a few minor considerations) upon the words "if he dies without issue." This phrase was held by the majority to mean dying without issue generally, and the word "estate" sufficient to carry the fee.

Lord Cairns' view (pp. 908, 909) was:—

"This little farm was to go through the family of her two sons, the parents taking first, and their children, in the sense of the collective term 'issue,' their family, taking after them . . . The testatrix had the idea of keeping the property in the family of the sons, and when it came to the first daughter stopping it there; . . . but the property, until it came to the first daughter, was to devolve in a way analogous to what we call the devolution of settled estate."

He, however, makes quite clear his position on the general law which would be operative if his reading of the words "die without issue" were not adopted. He says (p. 905):—

"It appears to me to be perfectly clear that the word 'estate,' before the new Wills Act, was a word sufficient to carry the fee if there was nothing at variance with that construction upon the whole of the will . . . I take it to be also quite clear that the word 'child' or 'children' is *primâ facie* a designation of a person or persons in the first degree of descent; but at the same time it may be used as a *nomen collectivum*: popularly it is so used . . . I take it also to be clear upon the authorities that if you have a gift to children, with words of division or of inheritance, the children would take as purchasers; and then if you have a gift over in the event of death without issue, those words pointing to death without issue are to be construed referentially and to have their explanation from the gift to the particular individuals that you have had before."

This last paragraph is quoted by Moss, C.J.O., in *Chandler v. Gibson* (*infra*).

Lord Blackburn, who agreed with Lord Cairns, says, at p. 915:—

" . . . if the devise had been to 'Thomas of all my real and freehold estate during the term of his natural life, and after his decease to his legitimate child or children if there be any,' and had

stopped there, the words would have been quite sufficient to give the children a fee."

On p. 918 he says:—

"If there was a sufficiently expressed intention to give the children estates in fee, it would be enough to justify putting on the words 'die without issue' the sense 'die without having had such issue, i.e., a child at all. Or, rather, the authorities cited by the Lord Chancellor I think would require us to put that construction on those words.'"

Page 920:—

"And I also think that if there is a devise of the inheritance to A. for life, and then that the inheritance shall go, on one contingency, to B., and, upon the contingency of the devise to B. not taking effect, to C., there would be enough to give B. or C., as the case might be, an estate in fee simple, and I do not think that would be different if the words of limitation were appended to the alternate devise to C. and not to that to B., or *vice versa*."

Lord FitzGerald deals with the point thus (p. 925):—

"If there had been nothing more in the will, after the words 'to his legitimate child or children' there could be no question but that the children would take the inheritance in fee."

Lord Selborne, then Lord Chancellor, took a different view of the words "if he die without issue," and at p. 896 thus deals with it:—

"If those dispositions had stood alone, without the contingent gifts over which follow them, it is, in my opinion, clear, that they would have given the eldest son of the testatrix, Thomas, an estate for life only, with remainder in fee simple to his children, if more than one, as joint tenants (or, if only one child, to that child) immediately on their, his, or her coming into existence. . . . The words 'all my real and freehold estate' in such a context, would, beyond question, have supplied the want of an express limitation to the children's heirs. 'Estate' here is a word free from ambiguity. It cannot (as in some cases) describe a particular subject, as distinguished from the entirety of the right and interest of the testatrix in that subject. She had the fee simple, and that is what she gives."

At pp. 897 and 898:—

"It is, however, necessary to construe these dispositions, not as if they stood alone, but with due regard to all the rest of the will . . .

"The primary sense of the word 'children' is issue of the first generation, and that primary sense ought to be adhered to,

App. Div.

1925.

RE HAIG.

Hodgins,
J.A.

App. Div. when there is nothing, or not enough, to displace it. There are, no
 1925. doubt, cases in which it is equivalent to issue in the widest sense,
 as in *Wild's Case* . . .

RE HAIG. "But there is no resemblance between such cases and one in
 Hodgins, which an estate is expressly given to the father 'during the term
 J.A. of his natural life' and 'after his decease to his legitimate child
 or children, if there be any:

"Unless, in this case, the subsequent context is enough to prevent the application of ordinary principles of construction, the children must take as purchasers, in remainder after their father's life-estate, whether they take for life only or in fee. I am myself unable to find anything in the subsequent context which ought to prevent them from so taking . . . If they take the fee, then (I think) the referential construction of the word 'issue' ought to prevail, and the gift over will take effect if there is no child."

And at pp. 899, 900:—

"A devise over, in the event of the death 'without issue' of a tenant for life, all whose children take in remainder after him in fee, does not, generally (according to authorities well founded in principle, and which have been regarded for more than a century as law), either enlarge the *primâ facie* sense of the word 'children,' so as to make it include issue beyond the first generation, or give an estate tail by implication to the tenant for life under the rule in *Shelley's Case*."

I have quoted somewhat largely from this case because it gives clear expression to the views of two very eminent Chancery lawyers on the terms of a will very similar, except for the words as to "issue," to the one in question here. The devise there was of "all my real estate," and the expression here is "the said property." Both describe what the testator was dealing with in limiting the life-estate and in providing for the subsequent devolution of the fee. If "estate" was sufficient in *Bowen v. Lewis* to carry the fee, the words in this will are ample for that purpose.

That case was followed by the Court of Appeal in *Chandler v. Gibson*, 2 O.L.R. 442. The devise was "to my son M. I give . . . 50 acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandsons."

The Court, founding itself largely upon *Bowen v. Lewis*, held that M. took an estate for life with a remainder in fee to the children, and not an estate tail, with a devise over in case there was no person to take under the previous devise in fee.

Grant v. Fuller, 33 Can. S.C.R. 34, is much in point. A de-

visé of land to D. for life "and to her children if any at her death" was held by the Supreme Court of Canada not to create an estate tail, but that on her death her children took the fee.

These cases were followed in *Re Sharon and Stuart*, 12 O.L.R. 605.

I may add that in Jarman's 6th edition (1910) the following paragraph appears: "Had the devise been to A. for life with remainder to the issue living at his death, the case would have been different. All the objects might then have taken by purchase."

My conclusion agrees with that of my brother Orde, that Alexander Clark Haig takes a life-estate in the lands and in the household goods, farming utensils and machinery, in the terms which I have quoted from *Chandler v. Gibson* (*ante*).

The frame of the declaration in clause 1 of the judgment is evidently copied from the learned Judge's reasoning and is not expressed as such a formal declaration should be.

The provision in the will that "the said Alexander Clark Haig has to pay to the executors the sum of \$5,000 for this property to help pay the legacies mentioned in this will" is interpolated among the provisions dealing with the management, control, and possession of the lands. But the words "for this property" are the same words as are used elsewhere in dealing with the devolution of the fee, and can only be construed in the same sense. For that reason, they cannot refer to the life-estate only, nor is it reasonable that they should, for the real estate is valued for probate at only \$7,650; and, assuming a yearly rental value on the basis of 5 per cent., \$382, it would take about 13 years to pay it if the nephew received immediate possession. But the testator contemplates that he may not work it and that the live stock may be sold and that in a certain event he may not get full possession till he is 25, i.e., for about 9 years after the will was made. It is the nephew himself who has to pay the \$5,000. There is no duty on the executors to pay or apply out of the rents anything on this amount. An examination of the assets of the estate shews that the personal estate, less the furniture, utensils, machinery, etc., and less the succession duties, as estimated, would just about pay the legacies. If the \$5,000 was to be paid for the life-estate and towards the legacies, it would mean that, either with or without full possession of the farm, according to the provisions of the will, the life-tenant would have to find this sum, if the executors so determined, before he could enjoy his interests—a rather extraordinary and unfair burden to put upon a young boy. Even if he was entitled by law to

App. Div.

1925.

RE HAIG.

Hodgins,
J.A.

App. Div. postpone payment till he came of age and could determine whether
 1925. or not he would accept the supposed benefits under the will, it
 RE HAIG. would still be unfair and oppressive. I prefer the view of the
 Hodgins, Judge appealed from on this point, and agree with him that this
 J.A. sentence involves an option enabling the devisee on payment to
 acquire the fee.

The appeal in this case is really confined to objecting to the judgment below because: (1) it is against law; (2) no charge for the \$5,000 is declared upon the interest of A. C. Haig; and (3) it was decided that an option was given to him. While many matters are determined in the judgment as issued, none but the foregoing were urged before us.

The quality of the estate came naturally into question under the first head and incidentally under Nos. 2 and 3. I think it follows that, if the direction is only an option, no charge is created unless and until it is exercised.

I am unable to see that it is possible to read the will as making the amount to be paid depend in any way on the shortage of the personal estate, if any, in paying the legacies in full—\$5,000 is the amount to be paid in any event.

The formal judgment as issued would be the better for revision so as to express the legal meaning of the Court in the terms usual in such a decree. This Court has already laid down the rule that executors and trustees must, except at the risk of costs, be satisfied with the opinion and advice of the Court as expressed by the Judge before whom the originating summons comes: *Re Fleck* (1924), 55 O.L.R. 441, 447, 448.

Consequently this appeal should be dismissed with costs.

Appeal allowed (HODGINS, J.A., dissenting).

[APPELLATE DIVISION.]

RE KING.

1924.

April 4.

1925.

April 6.

Will—Life-estate Given to Widow with Limited Power of Appointment—Whether Exercised by Will of Donee—Evidence—Intention of Donee—Life-estate in Personalty, including Money—Assets of Estates of Testator and of Donee of Power—Property “Expended” and “Accretions” to Property—“Possessed of or Entitled to.”

The testator, by his will, gave all his estate, subject to the payment of debts, to his executor “upon the following trusts and subject to the

following directions:" (1) to pay to each of the testator's four sons \$1,000 in cash; (2) the whole residue of the estate was to be held by the executor in trust for the testator's widow during the term of her natural life, and after her death "my property is to be distributed by my said executor as follows." Then followed (3) a list of houses, some being given to each of his four sons. The will then continued (4): "All the rest and residue of my estate remaining at the death of my said wife . . . is to be divided among my said four sons . . . as she shall by her last will appoint and in default of appointment the said residue is to be divided among my said sons . . . equally, the share of my said son E. to be held by my executor in trust and the income thereof paid . . . to . . . E. After the death of . . . E. his share is to be conveyed equally to" his "children." (5) "Any income or accretions of or to the life-interest of my said wife . . . which are not actually expended by her are to form part of the estate and my said wife is not to make any gifts out of the income or corpus without the consent of my executor hereinafter named." The wife survived the testator, and by her will gave "all the property that I may die possessed of or entitled to . . . to my four sons to be divided among them" in unequal shares, and also directed that if any one of three of her sons (named) should predecease her the share of that son should be given to his children in equal shares, and that if her fourth son (W.) should predecease her his share should be disposed of as directed in his last will:—

1924-25.

RE KING.

Held (FERGUSON, J.A., dissenting), that the power of appointment given to the wife was not exercised by her will.

The widow took a life-estate in all that her husband left at his death after payment of debts and four specific legacies, but he gave her power of appointment only in respect of what he had not specifically devised to his sons. Clause 5 was not ineffective as being uncertain—the whole will must be read together, and this clause was consistent with the widow's life-estate. Whatever she had not "expended" and any "accretions" to his estate were intended to be dealt with as part of his estate, and not as part of hers, and to this combined property the power of appointment was directed.

An interest for life may be given in a chattel similar to an estate for life in land.

When money is part of the personalty in which a life-estate is given, and there are words importing a right to possess and enjoy it in specie, the life-tenant may spend it; but the rule is different when the money, as part of the estate, is vested in trustees for the tenant for life, and, after his or her death, over.

Wakefield v. Wakefield (1901), 2 O.L.R. 33, followed.

Discussion of the meaning and effect of the words "possessed of or entitled to" in the widow's will.

Review of the authorities.

Per FERGUSON, J.A.:—The widow had by her will expressed an intention to dispose of and had disposed of all the property of her husband over which she, by his will, had a special power of appointment. All the property possessed by her at the time of her death came to her from his estate; and it mattered not whether part of it was her absolute property or part of it his estate in her rightful possession, for in either case her will disposed of it; and, as none of her sons predeceased her, disposed of it to persons entitled to take under the power. The whole property of the husband therefore passed under the widow's will.

1924.
RE KING.

MOTION by Jeremiah King the younger and John Joseph King, upon originating notice, for an order determining questions as to the meaning and effect of the wills of Jeremiah King the elder and Eliza King, his widow, both deceased.

April 3, 1924. The motion was heard by LOGIE, J., in the Weekly Court, Toronto.

S. F. Washington, K.C., for the applicants.

M. J. O'Reilly, K.C., for William King, in his individual capacity and as executor of the wills of Jeremiah King the elder and Eliza King.

April 4. LOGIE, J.:—Jeremiah King the elder, by his will, provided for the disposition of the residue of his estate as follows:—

“3. All the rest and residue of my estate remaining at the death of my said wife Eliza King is to be divided among my said four sons Edward John Jeremiah and William as she shall by her last will appoint and in default of appointment the said residue is to be divided among my said sons Edward John Jeremiah and William equally the share of my said son Edward to be held by my executor in trust and the income thereof paid by my said executor to my said son Edward. After the death of my said son Edward his share is to be conveyed equally to the children of my said son Edward.”

Eliza King survived her husband and disposed of her estate by her will as follows:—

“I give devise and bequeath all the property that I may die possessed of or entitled to both real and personal and wheresoever situate to my four sons namely John King Jeremiah King William King and Edward King to be divided amongst them in the manner following namely four and one half shares to my son William King two and one-half shares to my son Edward King two shares to my son John King and one share to my son Jeremiah King.

“I hereby direct that should any or either of my sons John King Jeremiah King or Edward King predecease me then and in that event I direct the share of the son so predeceasing me as aforesaid shall be given to his children in equal shares.”

The question arising for determination is, whether the power of appointment given to Eliza in her husband's will has been exercised by the provisions of her own will.

That this power was special and not general seems clear.

A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself or his executors and administrators.

Logie, J.

1924.

A special power can be exercised only in favour of certain specified persons or classes: Farwell on Powers, 3rd ed., p. 8.

RE KING.

Section 30 of the Wills Act (R.S.O. 1914, ch. 120) applies only to the disposition of property over which the testator had a general power of appointment under a general devise or bequest. It has no application to a special or limited power of appointment: Halsbury's Laws of England, vol. 23, p. 29, note (t); *In re Cochran* (1908), 16 O.L.R. 328, at p. 335.

The Wills Act being out of the way, it has now to be determined whether Eliza by her will has exercised the special power given her by Jeremiah's will.

Mr. O'Reilly contends that extrinsic evidence must of necessity be allowed in order to discover the intention of the testatrix; that you may place yourself, so to speak, in her arm-chair and consider the circumstances by which she was surrounded when she made her will to assist you in arriving at her intention: *Boyes v. Cook* (1880), 14 Ch. D. 53, 56. And he tenders therefore an affidavit to the effect that Eliza, at the time of her death, had no property, real or personal, of her own other than that purchased with money received from Jeremiah's estate in rents and profits during her life; that, by para. 5 of Jeremiah's will, these were to form part of his estate; and that, therefore, in making her will, she must have had this in mind, and so intended to exercise the power.

I do not deal with this ingenious argument or the effect of para. 5 of Jeremiah's will, because I am of opinion that such evidence of surrounding circumstances is inadmissible: *In re Huddleston*, [1894] 3 Ch. 595.

The true rule is set forth in *Higgins v. Dawson*, [1902] A.C. 1: the procedure is not first to ascertain the surrounding circumstances, and with that knowledge approach the construction of the will, but first construe the will; if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning or give the will a different meaning: *Re Warren* (1922), 52 O.L.R. 127, at p. 129; *Re White* (1922), 22 O.W.N. 266.

Looking then at the will of Eliza, there is nothing to shew that the testatrix meant to dispose of anything but her own property: every part of it is satisfied by giving all that she was possessed of; she speaks of all the property that she may die possessed of or entitled to. She ties the property to her estate.

Logie, J.

1924.

RE KING.

There is no reference to the instrument creating the power, or the property included in it, though these are only indicia of intention and not conclusive. It is impossible to find in this will an intention to pass property not belonging to herself but over which she had a power.

Therefore, reading the will alone, I do not see my way to say that this is an exercise of the special power contained in Jeremiah's will. On the contrary, I hold that it is not an exercise of the power at all: *In re Huddleston*, [1894] 3 Ch. 595; *Humphery v. Humphery* (1877), 36 L.T.R. 91.

I have not overlooked the cases cited by Mr. O'Reilly: *Deedes v. Graham* (1869), 16 Gr. 167; *Rogerson v. Campbell* (1905), 10 O.L.R. 748; *Re Ross* (1910), 1 O.W.N. 867. These I have read.

In the *Deedes* case the testatrix referred to that which was the subject of the power—"moneys now invested in mortgages." She had no mortgages other than those in which the settled estate was invested, and the Court held that the will would be inoperative as to these unless held to apply to the settled property.

In the *Rogerson* case Mr. Justice Anglin held, on the construction of the will there in question, that it was reasonably clear that the testatrix intended to exercise the power by reason of the facts set out by him—such, for instance, as the specific description of the land of which she had no other right of disposition.

The *Ross* case is authority only that a general residuary legacy, in the circumstances of that case, operated as an execution of a power of appointment.

Costs of all parties—those of the executor as between solicitor and client—out of the estate.

William King appealed from the judgment of LOGIE, J.

September 17, 1924. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

The Hon. George Lynch-Staunton, K.C., for the appellant.

Washington, K.C., for Jeremiah King the younger and John Joseph King, respondents.

The arguments and cases cited are sufficiently referred to in the judgments.

April 6, 1925. HODGINS, J.A.:—Appeal from Logie, J., who held that Eliza King had not by her will executed the power of appointment given to her under the will of her late husband, Jeremiah King.

Since the argument herein, a statement of facts regarding the assets of each estate, and how those belonging to Eliza King's estate had come into being, has been filed, and we have been asked to interpret both wills so far as is necessary to determine the question raised on this application. This statement of facts was not before Mr. Justice Logie.

App. Div.

1925.

RE KING.

Hodgins,
J.A.

The relevant passages in the wills are as follows:—

Will of Jeremiah King: "Subject to the payment of my just debts as aforesaid I give devise and bequeath all my real and personal estate of whatever kind or nature soever unto my executor hereinafter named upon the following trusts and subject to the following directions that is to say:—

"1. My said executor is to pay to each of my four sons Edward John Jeremiah and William (the latter being the executor hereinafter named) the sum of \$1,000 each in cash.

"2. The whole balance and residue of my said estate is to be held by my said trustee in trust for my widow Eliza King during the term of her natural life and after her death my property is to be distributed by my said executor as follows."

Then follows a list of houses in Hamilton, some being given to each of his four sons, to three in fee simple and to the fourth a life-estate, with remainder to his children, and, in case no children survive, then to his remaining sons.

The will then continues:—

"All the rest and residue of my estate remaining at the death of my said wife Eliza King is to be divided among my said four sons Edward John Jeremiah and William as she shall by her last will appoint and in default of appointment the said residue is to be divided among my said sons Edward John Jeremiah and William equally the share of my said son Edward to be held by my executor in trust and the income thereof paid by my said executor to my said son Edward. After the death of my said son Edward his share is to be conveyed equally to the children of my said son Edward.

"5. Any income or accretions of or to the life-interest of my said wife Eliza King which are not actually expended by her are to form part of the estate and my said wife is not to make any gifts out of the income or corpus without the consent of my executor hereinafter named."

Will of Eliza King: "I give devise and bequeath all the property that I may die possessed of or entitled to both real and personal and wheresoever situate to my four sons namely John King Jeremiah King William King and Edward King to be divided

App. Div.

1925.

RE KING.

Hodgins,
J.A.

amongst them in the manner following namely four and one-half shares to my son William King two and one-half shares to my son Edward King two shares to my son John King and one share to my son Jeremiah King.

"I hereby direct that should any or either of my sons John King Jeremiah King or Edward King predecease me then and in that event I direct the share of the son so predeceasing me as aforesaid shall be given to his children in equal shares.

"I hereby also direct that should my son William King predecease me then the share herein given to my son William King shall be disposed of as directed in the last will and testament of the said William King."

It is necessary to determine:—

(1) Whether any or all of the assets dealt with in Eliza King's will are governed by her husband's will, under the words "all the rest and residue of my estate remaining at the death of my said wife," "any income or accretions of or to the life-interest of my said wife Eliza King which are not actually expended by her are to form part of the estate."

(2) If they or any of them do not fall within these expressions, then do they, under the will of the widow, form an estate upon which its provisions can operate apart from the power, and if so was the power really exercised?

It is to be observed that all parties to this application concur in the use by the Court of the agreed statement of facts, as relevant evidence to aid in ascertaining to what things the wills of Jeremiah and Eliza King refer.

There is here no question as to the kind of estate which she took, and in what. It was a life-estate in all that Jeremiah King himself left at his death after payment of debts and four specific legacies. It consisted of houses in Hamilton, some money, and household furniture. But he gives his widow power of appointment only in respect of what he has not specifically devised to his sons. He gave to them on her death these houses in Hamilton (24 in all and a parcel of land). The power of appointment would, therefore, unless clause 5 is effective, operate only on the money and furniture, which he describes as the "rest and residue of my estate remaining at the death of my said wife." It is, as Lord Halsbury in *Higgins v. Dawson*, [1902] A.C. 1, at p. 5, says, the "residue and remainder of a particular thing." But the income of his whole estate, which included these houses, was ample for the widow. That it would, in the belief of the testator, be more than sufficient for her wants, is indicated by the provision

in clause 5, where he speaks of "accretions to" the life-interest, which, together with "any income . . . not actually expended," is to form part of his (Jeremiah's) estate. This is further enforced by the direction that "gifts out of the income or corpus" are not to be made by the widow without the executor's consent, thus guarding against depletion. I do not think that clause 5 is ineffective as being uncertain. The whole will must be read together, and this provision fits in with a life-estate, which entitles the widow to the usufruct only, in a way which it would not do if she was given an absolute estate, and this clause was appealed to as cutting it down to a mere life-estate: *cf. Lloyd v. Tweedy*, [1898] 1 I. R. 5, 13; *British and Foreign Bible Society v. Shapton* (1915), 7 O.W.N. 658; or one without a power to dispose of it by will: *Shearer v. Hogg* (1912), 46 Can. S.C.R. 492. It does not in any way hamper her enjoyment of her life-interest in the whole estate, and only operates on what she has not used or consumed, which is to be added to the "rest and residue of any estate remaining at the death of my said wife," i.e., to the money and furniture left by him. Whatever his widow had not "expended," and any "accretions" to his estate, were thus intended to be dealt with as part of his own estate and not as part of hers, and it is to this combined property that the power of appointment is directed. Whether or not Eliza King had the idea in her mind that what she intended to devise was only what she had, apart from what her husband had left, when she used the words "possessed of or entitled to," is not so clear. If she had, the scheme of each will would fit readily into that of the other. But, if she had not, then difficulty arises. It is permissible to ascertain to what the testator meant his language to apply: *Higgins v. Dawson (ante)*; *In re Gratwick's Trusts* (1865), L.R. 1 Eq. 177. If they are not within it, then they form part of Eliza King's estate, and the second question must be decided.

App. Div.
1925.
Re KING.
Hodgins,
J.A.

In arriving at the exact position of the various assets appearing to form part of Eliza King's estate, it is important to settle what a life-estate in ready money means and includes:

The rule as to money, when included under a life-estate in personalty, is, that where there are words importing a right to possess and enjoy it in specie the life-tenant may spend it: see *In re Thomson's Estate* (1880), 14 Ch. D. 263.

And this is usually the case where there are words indicating that what remains is to go to others: see *In re Tuck* (1905), 10 O.L.R. 309, 311, 312; *Re Cutler* (1916), 37 O.L.R. 42, 51.

But the rule is different when the money, as part of the estate, is vested in trustees for the tenant for life and after his death over.

App. Div.

1925.

RE KING.

Hodgins

J.A.

This was the opinion of a very experienced Equity lawyer, Maclellan, J.A., in *Wakefield v. Wakefield* (1901), 2 O.L.R. 33. In that case the widow was the executrix, and so became trustee. She was given all the testator's property, real and personal, "to be used and enjoyed by her during the time of her natural life and widowhood and after her decease or marrying again" to named members of his family. The property consisted of a brick-making plant, leases of clay land, money, etc. Maclellan, J.A., who thought the widow was entitled to use the assets in specie, said (pp. 39 and 40):—

"She transferred the money in the bank into her own name, disposed of the manufactured stock, collected the accounts, and paid off all the liabilities of the testator. Now, it was her clear duty to have placed in some secure state of investment, the money in her hands after paying the debts, and she was not at liberty to use it for her own purposes or in carrying on the tile business. I think the effect of the evidence is that she used the money of the estate just as if it had been her own absolutely. That was a clear breach of trust, committed no doubt for want of legal advice, but under circumstances not without much extenuation." And again (p. 41); "The widow herself was tenant for life of the money; and if she had put it out on lawful investments, would herself have been entitled to the whole of the interest and income."

See also the opinion of Elwood, J., in *Hodges v. Goodenough* (1916), 9 Sask. 124, on this point, p. 126.

Money, where it was intended to be preserved for issue, has been treated as land for the purpose of allowing the husband to have the interest or proceeds thereof as tenant by the courtesy: *Sweetapple v. Bindon* (1705), 2 Vern. 536.

This view appears to be derived from a consideration of the way in which Equity treats estates purporting to be given in chattels.

In Goodeve on Personal Property, 5th ed., pp. 7, 8, it is said:—

"If it is desired to give only a limited interest, or to create interests in succession in personal property, the interposition of trustees is necessary, and the whole legal interest is vested in them, the beneficial interests being defined by a declaration of the trusts upon which they are to hold the property . . .

"Such dispositions are often called executory bequests; and the Court will interpose for the protection of the successive interests, and thus preserve the property during the subsistence of the limited interests for the benefit of the person entitled to the absolute interest."

In Flood on Wills of Personal Property (1877), p. 278, it is very well put. He says:—

“Equity, however, in its progress along the line of truth and common sense, has allowed interests to be created in personal property, analogous to those which the law allowed to be formed out of realty, and at the present day an interest for life may be given in a chattel similar to an estate for life in land.”

In Williams’s Law of Personal Property, 17th ed., p. 396, the learned author says:—

“If the gift had been of the use or enjoyment of the goods only to A. for his life, and after his decease to B., the Court would then have assisted B. by declaring A.’s representatives after his decease to be trustees only for the benefit of B . . . The only case in which the tenant for life is now entitled absolutely to things given to him for life is, that of articles *quæ ipso usu consumuntur*, as wines, etc., a gift of which to a person for his life vests in him the absolute ownership. In all other cases, as we have said, modern equity will assist the donee in remainder, to whom any gift of personal estate may have been made after the decease of another, who was to have them only for his life.”

These opinions are borne out by the explanation given by Sir William Grant, M.R., in *Randall v. Russell* (1817), 3 Mer. 190, at p. 195:—

“Originally we know that, by our law, there could be no limitation over of a chattel, but that a gift for life carried the absolute interest. Then a distinction was taken between the use and the property. The use might be given to one for life, and the property afterwards, to another.

“A gift for life of a chattel is now construed to be a gift of the usufruct only. But, when the use and the property can have no separate existence, it should seem that the old rule must still prevail, and that a limitation over, after a life-interest, must be held to be ineffectual.”

I now deal with the various items in detail:—

(1) 406 Dundurn street, Hamilton, \$3,750: This was bought out of moneys lying to the credit of her husband. This money was part of the assets in which she might enjoy a life-estate. Her husband’s will vested it in the trustee to be held in trust for her during her natural life. If the estate had been given to her with unlimited power “to be disposed of as she may think proper for her own use or benefit” as in *In re Thomson’s Estate* (ante), she might spend it without being accountable. But here she is limited to a strict life-estate in it, as would appear from the

App. Div.

1925.

RE KING.

Hodgins,
J.A.

App. Div. language of her husband's will. The word "expended" might
1925. under other circumstances be satisfied by the purchase of a house.
RE KING. "Money," says Meredith, C.J.C.P., in *Re Richer* (1919), 46
O.L.R. 367, at p. 370, "only can be spent in the sense of 'parted
Hodgins, with,' in exchange for other things"

J.A.

But here the word must receive a more restricted definition. The purchase of the house is in effect only a change of investment and in the substituted asset the widow had and enjoyed her life-estate.

(2) \$1,580.21: The balance of the moneys originally deposited to Jeremiah's credit with a loan company and transferred to Eliza King's credit must likewise be treated as unexpended.

(3) *William King's note \$3,000; Edward King's note \$350*: These represent loans out of income and rents to which she as life-tenant was entitled, and which she reduced into possession, taking these notes in lieu thereof as investments of her own. These, as in the case of the house, represent money invested, and not money "actually expended." "Actually" is a word of emphasis: *Robinson v. Marsh*, [1921] 2 K.B. 640; *Canadian National Fire Insurance Co. v. Colonsay Hotel Co.*, [1923] S.C.R. 688.

(4) \$3,799 is income, rents, and interest collected and deposited by her to her credit in the bank, and was not "actually expended" but put in deposit for safe-keeping.

(5) \$500 was owing by a son to her for rent of 389 Jackson street. It was never reduced into her possession, so that she could not and did not expend it.

(6) \$78.05 was rent collected for but not received by her, so that she never received it and could not and did not expend it.

I should, therefore, hold that 406 Dundurn street and the sums of \$1,580.21, \$3,000, \$350, \$3,799, \$500, and \$75 formed part of Jeremiah King's estate and passed under his will, but subject to her debts, leaving the \$200 of household furniture as Eliza King's estate.

The words of her will make no reference to the power of appointment. William King owed her \$3,000 and she gives him $4\frac{1}{2}$ shares; Edward owed her \$350, and she gives him $2\frac{1}{2}$ shares; John owed \$500, and gets two shares; and Jeremiah 1 share. She may have had these things in mind, and so had a method in this division. She used the words "possessed of or entitled to," which aptly describe the estate she left. See the judgment of Kekewich, J., in *In re Huddleston*, [1894] 3 Ch. 595, at p. 601; and *Innes v. Sayer* (1851), 3 Mac. & G. 606, 616: "Where the testator has property of his own, and a power of appointing other property,

and the words he uses may be fully satisfied by referring them to his own property, they will not be referred to the property over which he has only a power of appointment." She also makes a provision contrary to the terms of the power, in that she gives the children the portion of their father if he predeceases her.

My conclusion is that the judgment of Mr. Justice Logie was right and the power not exercised.

The rights of the parties in the property and assets scheduled as part of Eliza King's estate will be as indicated in these reasons. Costs of all parties may in this case be paid out of the estate.

Since writing the foregoing, I have read with care my brother Ferguson's judgment (*infra*).

I think the word "possessed" may, as he says, mean what the widow at her death had dominion over by virtue of her life-estate. But there are two reasons why I think it was not intended by the use of that word to exercise the power of appointment. One is that the husband's trustee was directed to hold the estate in trust, and therefore intact, in order that he could comply with the testator's directions given as to its division, so that the possession by her of any part of it or her title thereto would terminate at her death, and it would become part of his estate. This he specifically directs.

The other and stronger reason is to be found in her will, by which, instead of appointing it among his four sons, as he specifically provides, she distributes it not to them but only to those who survive at her death. The share of those who predecease her is to go, as to three, to their children, and in the case of William as directed by his will.

This would be an invalid appointment, as the power is a special power, and so only exerciseable by some manifest intention, and the construction which I think should prevail would avoid this result.

MULOCK, C.J.O., MAGEE, J.A., and SMITH, J.A., agreed with HODGINS, J.A.

FERGUSON, J.A. (after setting out the facts and the provisions of the two wills):—The learned Judge whose judgment is appealed from was of opinion: (1) that the power to be exercised was a special power, and therefore one to which sec. 30 of the Wills Act (R.S.O. 1914, ch. 120) was not applicable; (2) that evidence that Eliza King at the time of her death had no real or personal property other than that which was received from the estate of

App. Div.

1925.

RE KING.

Hodgins,
J.A.

App. Div.

1925.

RE KING.

Ferguson,
J.A.

Jeremiah King was not admissible; (3) that it is impossible to find in the will of Eliza King an intention to pass property not belonging to herself, but over which she had a power.

William King, named as executor in both wills, appealed and contended that the words used by Eliza King to describe the property to be affected by her will did not clearly express an intention to restrict the disposition to property owned by the deceased as distinguished from property over which she had the power of disposition, and that in these circumstances the learned Judge appealed from erred in refusing to admit and consider evidence to shew what property Eliza King owned or possessed. On the argument, this Court was of opinion that such evidence should be received, and counsel for all parties undertook to agree upon and file a statement of facts shewing the property owned and possessed by Eliza King at the date of the will and at the time of her death. Counsel have agreed upon such statement of facts and have filed it, together with a written request that on the material now before the Court we shall determine the ownership of the property described in schedule B to the statement of facts.

[The learned Judge set out the statement of facts at length. It is synthesised in the judgment of HODGINS, J.A., *supra*.]

I think it is clear:—

(1) That the power of appointment to Eliza King by the will of Jeremiah King was a special power, and therefore not affected by sec. 30 of the Wills Act (R.S.O. 1914, ch. 120).

(2) That if, according to their grammatical, ordinary, and primary meaning, the words “all the property I die possessed of” clearly and without doubt described only the property of the testatrix, the bequest relied upon amounted only to a general devise or bequest of the property of Eliza King.

(3) That a general devise and bequest of the testator’s property standing alone, that is, without something else to indicate a contrary intention, is not sufficient evidence of an intention to appoint property over which Eliza King had merely a special power of appointment: *In re Ackerley*, [1913] 1 Ch. 510, 515, and other cases collected in Hayes & Jarman’s Forms of Wills, 14th ed., pp. 66, 67, and 68.

(4) That, if the words “all the property I die possessed of” are clear and capable of only one interpretation, the condition of the testator’s assets ought not to be gone into and considered for the purpose of altering the meaning of language in itself perfectly clear: *Higgins v. Dawson*, [1902] A.C. 1.

(5) That, if the meaning of the language is not clear and it

may be read in two or more ways, then evidence of the facts known to the testatrix at the time she made her will is admissible in order to ascertain the bearing and application of the language: *Charter v. Charter* (1874), L.R. 7 H.L. 364, at p. 377; *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, at p. 764.

It seems to follow that the right to consider the statement of facts filed turns on whether the words "all the property I die possessed of," when read in their grammatical and ordinary sense, clearly and without doubt described only the property of Eliza King.

I have looked at many judicial dictionaries to ascertain the view taken by others as to the meaning of the word "possessed" or the words "to possess," and therein I found references to many cases dealing with the meaning of these words; but consideration of them has led me to the conclusion that the meaning to be given to them depends largely on the context, and that they serve to illustrate a statement of White, Chief Justice of the United States, made in *Porto Rico, People of, v. Rosaly y Castillo* (1913), 227 U.S. 270, 275, that "like words may have one significance in one context and a different signification in another," and that of Jessel, M.R., found in *Aspden v. Seddon* (1874), L.R. 10 Ch. 394, at p. 397, note, that "a lamentable waste of judicial time and power is often involved in examining decisions with regard to the meaning of words which with one context are capable of one meaning and with another context of another meaning." For instance, in *Wilton v. Colvin* (1856), 3 Drew. 617, at p. 623, Vice-Chancellor Kindersley thought the word "possessed" might have three different meanings: (1) actual manual possession; (2) in connection with the word "seised," as meaning all property the party is entitled to, whether in possession, remainder or reversion; (3) an estate in possession as distinguished from an estate in reversion or remainder.

In *In re Jacob, Mortimer v. Mortimer*, [1907] 1 Ch. 445, Mr. Justice Parker interpreted the words "all stocks, shares and securities which I possess or to which I am entitled" as a "bequest of personal property described in a general manner," and therefore as a sufficient description of property the testatrix had for the purpose of the execution, within the meaning of sec. 27 of the English Wills Act (sec. 30 of our own), of a general power, rather than as a bequest of only such shares as the testator had in his actual possession.

In *Whitehead v. Gibbons* (1854), 10 N.J. Eq. 230, it was held that the words "die possessed of" were intended to embrace everything that the testator had a right to dispose of by will.

App. Div.

1925.

RE KING.

Ferguson,
J.A.

App. Div.
1925.

RE KING.

Ferguson,
J.A.

In *Mayor of Detroit v. Moran* (1880), 7 N.W. Repr. 180 (Mich.), it was said:—

“ ‘Possessed’ is a variable term in the law, and has different meanings as it is used in different circumstances. It sometimes implies a temporary interest in lands, as we say a man is possessed, in contradistinction to being seised. It sometimes implies the corporal having; as we say a man is seised and possessed. But it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his. In this sense it may be used even though an intruder may have excluded the owner for the time being. And there is never any impropriety in making use of the term when the only possession the intruder has is apparently subordinate to that of the general owner.”

See other cases collected in 31 Cyc., p. 922.

Webster's Dictionary gives the following synonyms for “pos-
sessed:”—

“Syn: be in possession of, be possessed of, have, hold, occupy. own. Have is the most general word, and is applied to whatever belongs to or is connected with one; a man has a head or a headache, a fortune or an opinion, a friend or an enemy; he has time, or has need; he may be said to have what is his own, what he has borrowed, what has been entrusted to him, or what he has stolen. To hold is to have in one's hand, or securely in one's control; a man holds his friend's coat for a moment, or he holds a struggling horse; he holds a promissory note, or holds an office. To own is to have the right of property in; to possess is to have that right in actual exercise; to occupy is to have possession and use, with some degree of permanency, with or without ownership. A man occupies his own house, or a room in a hotel; a man may own a farm of which he is not in possession because a tenant occupies it and is determined to hold it; the proprietor owns the property, but the tenant is in possession. To be in possession differs from possess in that to possess denotes both right and fact, while to be in possession denotes simply the fact with no affirmation as to the right. To have reason is to be endowed with the faculty; to be in possession of one's reason denotes that the faculty is in actual present exercise.”

After considering, among others, the foregoing cases and dictionaries, I have reached the conclusion that, according to etymology and their grammatical and ordinary meaning, the words “to possess” or “to be possessed of” mean the right to have in possession or to have in possession as of right or as master rather than to have as absolute owner.

On my reading of the provisions of the will of Jeremiah King,

Eliza King received a life-estate in the residuary estate of Jeremiah King, and not a mere right to receive the rents, profits and income of his estate, and therefore was at the time of her death the owner of a life-estate in possession. The relative words of Jeremiah King's will read: "The whole balance and residue of my estate is to be held by my said trustee in trust for my widow Eliza King during the term of her natural life and after her death."

App. Div.

1925.

RE KING.

Ferguson,
J.A.

The facts are that at the time of her death Eliza King was in possession of the estate of Jeremiah King, over which she had a power of appointment and had a life-estate therein, with the right to expend most of it; and I am of opinion that, whether she had the legal right to possession of such of the corpus as was money or not, she thought she was in possession of it as master or as of right. It seems to follow that if the words "all the property I die possessed of," according to their grammatical and natural and ordinary meaning, mean all property Eliza King owned an interest in or had a right to possession of, or was in possession of as owner, or as of right, or as master, they were sufficient to describe and do describe all the property of Jeremiah King over which Eliza King had a power of appointment; and the question for our determination is: "Is there anything in the context in which these words are used, or the circumstances under which they were used, which would justify us in giving or require us to give these words anything other than their grammatical, ordinary, and natural meaning?" rather than: "Is there anything in the context and the circumstances which requires us to interpret these words as merely a general devise or bequest of the testator's property (see R. S. O. 1914, ch. 120, sec. 30)?" And then endeavour to find in the context and circumstances something to indicate an intention to deal with property other than that which Eliza King owned absolutely. It is, I think, clear that the authorities require us to give the words their grammatical, natural, and ordinary meaning, unless, by such interpretation, we are doing something which is inconsistent with what appears upon the face of the will or doing something which manifestly must be acting contrary to the real objects of the testatrix.

This, I think, is the effect and meaning of *Grey v. Pearson* (1857), 6 H.L.C. 61. At p. 78, the Lord Chancellor said:—

"The rule which, in modern times particularly, the Courts have always been anxiously inclined to follow, has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and to give to those words their natural ordinary meaning, unless, by so doing, it appears from the context, that you are using them in a different sense from that in which the

App. Div. testator or the maker of the deed intended to use them, or, unless
1925. by so using them, you would be doing something which would mani-
RE KING. festly lead to an inconsistency, which could not have been the inten-
tion of the party making the instrument."

Ferguson,
J.A.

At p. 91, Lord St. Leonards said:—

"As a general rule, words should be received in their natural grammatical import, and effect given, if possible, to every word in the will."

At p. 106, Lord Wensleydale said:—

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

The rule laid down by Lord Wensleydale is quoted in Maxwell on Statutes, 6th ed., p. 4, as stating the fundamental principle of construction.

That brings us to the question: Is there any word used by Eliza King to describe the property she disposes of by her will, which requires us to hold that in using the word "possessed" she was describing only her own property or property in which she had the entire estate? The words of description read: "All the property that I may die possessed of or entitled to both real and personal wheresoever situate."

According to Webster, "entitle" means "to give a claim to," and according to Corpus Juris, vol. 20, p. 1272, "entitle" means "to give a claim, right, or title to," and "entitled," when used to express "the idea of ownership, does not signify complete ownership but merely a claim or right thereto," so that there is nothing in the use of the word "entitled" along with the word "possessed" which requires us to hold that Eliza King did not intend by either or both words to describe property in which she had a life-estate and of which she was in possession as mistress.

The next question is: "Is there in the facts and circumstances anything which indicates and requires us to hold that the description used by Eliza King was not intended to extend to and include property which at the time of her death Eliza King had in possession as mistress?"

In each case, it is a matter of intention gathered from the words used, read in the light of attendant circumstances: see *In re Sharland*, [1899] 2 Ch. 536; and I find nothing in the facts that requires us to limit the ordinary, natural meaning of the words used.

Applying, then, Lord Wensleydale's rule of construction to the words describing the property disposed of by the will of Eliza King, and reading these words in the light of the facts disclosed in the statement of facts filed, I am of opinion that Eliza King has by her will expressed an intention to dispose of and has disposed of all the property of Jeremiah King over which she, by his will, had a special power of appointment, and I would allow the appeal and declare accordingly.

The statement of facts discloses that all the property possessed by Eliza King at the time of her death came to her from the estate of Jeremiah King; and, while I incline to the view that all such property should be held to be part of the estate of Jeremiah King, unexpended by Eliza King, except perhaps sufficient to pay her debts, I do not think it now necessary to determine that question; for, in the view I have taken, it matters not whether part of the property described in schedule B was Eliza King's absolute property or part of it Jeremiah King's estate in the rightful possession of Eliza King at the time of her death, for in either case the will of Eliza King disposes of it; and, as none of her sons predeceased the testatrix, disposes of it to persons entitled to take under the power.

Appeal dismissed with the declaration mentioned by HODGINS, J.A. (FERGUSON, J.A., dissenting).

App. Div.

1925.

RE KING.

Ferguson,
J.A.

[IN CHAMBERS.]

RE BUTTON.

1925.

April 7.

Covenant—Building Restriction—Conveyancing and Law of Property Act, sec. 57 (12 & 13 Geo. V. ch. 53, sec. 2)—Application to Isolated Restriction—"Beneficial to the Persons Principally Concerned."

Section 57 of the Conveyancing and Law of Property Act, as enacted in 1922 by 12 & 13 Geo. V. ch. 53, sec. 2, is not restricted in its operation to building schemes—its language is wide enough to cover an isolated restriction.

In the circumstances of this case, an order was made, under sec. 57, discharging a building restriction in the form of a covenant purporting to be made by W. in a conveyance of land to him by E., the con-

1925.
RE BUTTON.

veyance not being executed by W., and the isolated restriction which it purported to impose preventing the erection of a dwelling house nearer than 15 feet from the street-line, or costing less than \$2,500. Meaning of the concluding words of subsec. 1 of sec. 57, "beneficial to the persons principally concerned," explained.

MOTION by James H. Button for an order for the discharge of a certain building restriction affecting land owned by him.

March 27. The motion was heard by ORDE, J.A., in Chambers.
A. G. F. Lawrence, for the applicant.
C. Kappeler, for Henry J. Elton.

April 7. ORDE, J.A.:—James H. Button, the owner of lot 15 in block C on the west side of Astley avenue, Toronto, according to plan No. 920, moves, under sec. 57 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, as enacted in 1922 by 12 & 13 Geo. V. ch. 53, sec. 2,* for the discharge of a certain building restriction.

The restriction here in question is no part of a building scheme. It is in the form of a covenant purporting to be made by one Watson, to whom lot 15 was conveyed by Elton. The deed is not signed by Watson, nor is the benefit of the covenant annexed to any lands belonging to Elton, and there is no reciprocal covenant by Elton. At the time, Elton owned several lots on the east side of Astley avenue, all of which, with the exception of one small parcel, he has since sold without imposing any building restrictions. The parcel he has retained is across the street but a little to the south of lot 15. Elton also acquired and afterwards sold lot 14 on the west side of Astley avenue, which adjoins lot 15, without imposing any building restrictions. Button has also acquired part of lot 16, immediately to the north, and that is not subject to any restriction.

At the north-east angle of lot 14, Astley avenue turns to the

* 2. The Conveyancing and Law of Property Act is amended by adding the following as section 57:—

57.—(1) Where there is annexed to any land which has not been registered under the Land Titles Act any condition or covenant that such land or any specified portion thereof is not to be built on or is to be or not to be used in a particular manner, or any condition or covenant running with or capable of being legally annexed to land, any such condition or covenant may be modified or discharged by order of a Judge of the Supreme Court on proof to his satisfaction that the modification will be beneficial to the persons principally concerned.

(2) Before making any such order the Judge shall cause notice of the application to be given to such persons as shall appear to him to be interested in the relief sought either by personal service, advertisement or by registered mail as he shall direct.

(As to land under the Land Titles Act, see section 99 of that Act.)

north-west at an angle of about 45 degrees—so that, while the southern boundary of lot 15 is 136 feet in length, the northern boundary is only 90 feet 9 inches. The width of the lot at right angles is 50 feet, but the slanting frontage at the street-line is 68 feet 5 inches.

The restriction which Elton's deed to Watson purports to impose prevents the erection of a dwelling house nearer than 15 feet from the street-line, or costing less than \$2,500.

The shape of lot 15 is such that no dwelling can reasonably be built with its front wall parallel to the street-line. This means that in order to keep the north-east corner of the building 15 feet distant from the street-line, the building must be placed so far back as to destroy a large part of the value of the lot.

Button is erecting a dwelling to cost \$18,000. He wishes to build it so that the north-east corner will be about 7 feet from the street-line and the south-east corner about 33 feet from the street-line. There is already a house on lot 16 whose north-east corner is closer to the street-line than 7 feet.

The purchaser of the other lands from Elton, who was notified—though probably not entitled to notice, as he could have no legal right to enforce the covenant—did not appear.

Elton's opposition to the application is rather interesting. He can give no reason for having attempted to impose an isolated and really useless restriction in the deed to Watson. But he desires to erect an apartment-house on that part of lot 6 across the street which he still owns, and he is willing to release Button from the restriction if Button will sign a petition to the city council to assist him in getting a permit to enable him to build the apartment-house. Button declines to do this, and I think quite properly.

Having regard to the particular circumstances, I think the case is one for the exercise of the power given by this unusual piece of legislation. There is nothing in the section restricting its operation to building schemes. Its language is wide enough to cover an isolated restriction like this.

The concluding words of subsec. 1 have given me some trouble. Just what is meant by "will be beneficial to the persons principally concerned" is not clear. If it means that the modification must be beneficial to *all* the persons principally concerned, and the covenantee is considered one of the latter, then the Act becomes ineffective. What I think is meant is that the Judge must first determine who are or is principally concerned, that is, of all those interested, whose interest is the greater as between those who seek to modify the restriction and those seeking to enforce it? If the Judge comes

Orde, J.A.
1925.
RE BUTTON.

Orde, J.A. to the conclusion that the latter can derive no real or substantial benefit by enforcing the restriction, then they cease to be "principally" concerned. In the present case, whatever value the restriction may have had to Elton when he first imposed it has been absolutely destroyed by his failure to impose similar restrictions upon other lands which he afterwards sold. The restriction is now absolutely meaningless and useless, and should, in my judgment, be discharged.

I make no order as to costs.

[IN CHAMBERS.]

1925.

ORPEN V. ATTORNEY-GENERAL FOR ONTARIO.

April 8.

Costs—Taxation—Counsel-fee on Argument of Appeal—Quantum—Appeal from Decision of Taxing Officer—Length of Argument.

The Taxing Officer's decision as to the amount of a counsel-fee will not be interfered with upon appeal unless a gross mistake is shewn. *Re Solicitors* (1912), 27 O.L.R. 147, and *Brown v. Sewell* (1880), 16 Ch. D. 517, followed. The amount of the counsel-fee must not be made to depend upon the length of the argument.

AN appeal by the plaintiffs from the allowance by the Taxing Officer of a fee of \$500 to counsel for the defendant upon an appeal. This counsel-fee was allowed, upon the taxation of the defendant's costs of the plaintiffs' unsuccessful appeal to the Appellate Division (see 56 O.L.R. 530) from the judgment of RIDDELL, J. (56 O.L.R. 327), dismissing the action.

April 7. The appeal from the Taxing Officer's ruling was heard by RIDDELL, J., in Chambers.

H. S. White, K.C., for the plaintiffs, contended that, inasmuch as the motion before Mr. Justice Riddell, from whose order the appeal to the Appellate Division was taken, was an interlocutory motion, the costs of which were taxable, under item number 11 of Tariff A., at a maximum of \$50 for all services, including preparation of material, counsel-fee on argument, and issuing order, the Court must have intended that sum to be adequate for party and party costs of such a motion; and that, as the argument in the Appellate Division really involved no new preparation, the allowance of a counsel-fee of ten times fifty dollars for such argument could in no way be justified. Even if the Taxing Officer felt that

the amount he could allow on the interlocutory motion was inadequate, he could not as a matter of principle use this as a basis for fixing the fee in the Appellate Division. Counsel also contended that, in view of the fact that the argument of the appeal lasted only half a day, the fee allowed was excessive and unreasonable.

G. E. Parkinson, for the defendant, argued that the questions involved in the appeal were of great importance; that the fee in question was entirely in the discretion of the Taxing Officer; and that the exercise of that discretion should not be interfered with.

April 8. RIDDELL, J.:—An appeal from the Taxing Officer, who allowed a fee of \$500 to counsel for the Attorney-General on the appeal to the Second Divisional Court from my judgment (1925), 56 O.L.R. 327.

The rule to be followed in such appeals has long been settled both in England and in Ontario—many cases are given in Holmsted's *Judicature Act* (1915), notes on Rule 509, pp. 1126 and 1127.

The Court must necessarily possess a general jurisdiction over the Taxing Officer, in all matters, to prevent wrong to parties; but no countenance can be given to the proposition that, where he has not made any mistake in principle and the sum awarded is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court will interfere with the discretion of the Taxing Officer: *Re Solicitor* (1908), 12 O.W.R. 1074, at p. 1075; *Re Solicitors* (1912), 27 O.L.R. 147, at pp. 153, 154.

"If the matter could properly be regarded . . . as not involving any principle, but merely a question of amount . . . I for one would not think of interfering:" *per* Garrow, J.A., in 27 O.L.R. at p. 159. And the Court of Appeal decided in the latter case that the law was properly laid down in the former, in words already quoted in effect.

As is said in *Brown v. Sewell* (1880), 16 Ch. D. 517, "The Taxing Master's decision as to the amount of counsel's fees will not be interfered with unless a gross mistake is made."

See *Connec v. North American Railway Contracting Co.* (1890), 13 P.R. 433, and cases cited in the cases in 12 O.W.R. and 27 O.L.R.

Is there a gross mistake here? The main argument was based upon the length of time employed in the argument.

I refuse to lay down or follow any rule that the amount of the counsel-fee is to depend, in whole or in part, upon the length of the

1925.
ORPEN
v.
ATTORNEY-
GENERAL
FOR
ONTARIO.

Riddell, J.
 1925.
 ORPEN
 v.
 ATTORNEY-
 GENERAL
 FOR
 ONTARIO.

argument. Every one with any experience in Courts must know that the length of time an argument takes, is not infrequently in inverse proportion to the thoroughness of preparation and effectiveness of presentation. Long, loose, flabby dissertations are a reproach to practice and a hindrance to the speedy and effective determination of rights; and it is as great a breach of Magna Carta to delay as to deny justice. We have not yet adopted the rule which the Supreme Court of Canada was forced to lay down, of limiting the length of argument; but I trust we shall never punish careful preparation and lucid and concise presentation, and reward unconnected and extended dissertation or empty oratory, by measuring the fee to be given by the length of the address.

I think the fee a reasonable one; and have been confirmed in that opinion by some of the Judges of the appellate Court.

The appeal is dismissed with costs.

[LOGIE, J.]

RE HAZELL.

1925.

April 8.

Dower—Inchoate Right—Whether Defeated by Conveyance to Uses—Estate in Fee and Power of Appointment Subsisting in same Person—Appointment by Way of Mortgage—Whether Power thereby Exhausted—Estate Acquired—Effect of Registration of Discharge of Mortgage—Registry Act, R.S.O. 1914, ch. 124, sec. 67—Statute of Uses, 27 Hen. VIII. ch. 10—Dower Act, R.S.O. 1914, ch. 70, sec. 4.

In 1921 land was conveyed by C. to M., a married man, by deed to uses, the *habendum* being for such uses as M. should by deed, etc., appoint and in default of appointment unto the use of M., his heirs and assigns forever. The land was then clear of incumbrances. In March, 1924, M. mortgaged the land to V., reciting that he was seised of an estate in fee simple in the land, and purporting to "grant, mortgage, limit, and appoint" unto the mortgagee, etc. M.'s wife did not join in the mortgage. A few days later, M. purported to convey the land to B., by another deed to uses, the same as in the deed from C. M.'s wife did not join in this deed. On the 20th March, 1925, V. executed a statutory discharge of her mortgage, and this was registered on the 24th March, 1925. On the 25th March, 1925, B. conveyed the land to H., by a deed in the ordinary form, pursuant to the Short Forms of Conveyances Act, the grant being, "The grantor doth grant limit and appoint unto the grantee in fee simple." B.'s wife did not join in this deed:—

Held, that a general power of appointment over the whole estate may subsist in the person who has the fee.

Maundrell v. Maundrell (1805), 10 Ves. 246, followed.

M., by the execution of the deed to B., exercised his power of appointment, and B. came in as if named in the conveyance from C., and so B.'s right was paramount to any inchoate right of dower in M.'s wife.

- (2) When B. appointed in fee to H., the original seisin was attracted, and the Statute of Uses transferred the legal estate to H.: so the right to dower of B.'s wife was defeated, because the necessary element of seisin in B. was absent. 1925. RE HAZELL.
- (3) M., by appointing to V. by way of mortgage, did not exhaust his power.
- (4) By virtue of sec. 67 of the Registry Act, upon the registration of the discharge of V.'s mortgage, B. had "the original estate of the mortgagor (M.) therein," and the dower of B.'s wife did not attach.

APPLICATION by William Hazell, under Rule 603, for an order determining questions concerning the title to a parcel of land in the city of Hamilton.

April 2. The application was heard by LOGIE, J., in the Weekly Court, Toronto.

George C. Thomson, for the applicant.

H. A. Burbidge, for Lillian W. Marshall.

H. E. B. Coyne, for Ethel D. Brown.

April 8. LOGIE, J.:—The land was conveyed by Florrie S. Cooper to John Roy Marshall on the 11th July, 1921, by deed to uses, the grant being "unto the said grantee to and for the uses hereinafter declared"—*habendum*, "to have and to hold unto the grantee to and for such uses as he shall by deed mortgage will or other instrument in writing appoint and in default of and until such appointment or in so far as such appointment shall not extend unto the use of the grantee his heirs and assigns forever." Marshall was then and now is a married man. The land was then clear of incumbrances.

On the 19th March, 1924, Marshall mortgaged the land to Isabel Vila to secure \$500 and interest, the mortgage-deed reciting that, "whereas the mortgagor being seised of an estate in fee simple in possession of the lands mentioned has applied to the mortgagee for a loan," etc., and then purporting to "grant mortgage limit and appoint unto the mortgagee her heirs executors administrators and assigns forever," all and singular the said land. Marshall's wife did not join in this mortgage.

On the 23rd March, 1924, Marshall purported to convey the said land to George S. Brown (who then was and now is a married man), the conveyance taking the form of another deed to uses in which the grantor "doth grant limit and appoint unto the said grantee *in fee simple* to and upon the uses hereinafter contained"—*habendum*, "to have and to hold unto the said grantee unto such uses as he the said grantee may by deed will mortgage or other instrument in writing appoint and until and

Logie, J. in default of appointment and in so far as such appointment may
1925. not extend unto the use of the said grantee his heirs and assigns
RE HAZELL. to and for his and their sole and only use forever." Marshall's
wife did not join in this deed.

On the 20th March, 1925, Isabel Vila executed a discharge in statutory form of the \$500 mortgage made to her by Marshall, reciting that Marshall had satisfied all money due thereunder. This was registered on the 24th March, 1925.

On the 25th March, 1925, George S. Brown conveyed the said land to William Hazell, by ordinary form of deed drawn pursuant to the Short Forms of Conveyances Act, but purporting (without so stating) to be in exercise of his power of appointment contained in the deed from Marshall to Brown, the grant being—"The grantor doth grant limit and appoint unto the grantee in fee simple." Brown's wife did not join in this deed.

The questions which the Court is asked to determine, put in a little different language from those set out in the notice of motion, are:—

1. Has Marshall's wife any inchoate right of dower?
2. Has Brown's wife?
3. Did Marshall, by his mortgage to Vila, exhaust his right to appoint his equity of redemption?
4. What is the nature of the estate which Brown acquired from Marshall?
5. What is the effect of the registration of the Vila discharge (a) on the estate which Brown had, (b) as to the attachment of any inchoate right of dower in his wife?

It is conceded that a conveyance may be so drawn that the wife's dower will never attach at all, and that it may be drawn so that the husband may convey the land and defeat dower which has attached.

Thus, to take a simple case, a conveyance may be made to a third person to such uses as the husband shall appoint and in default of and till appointment to the use of the husband in fee.

Here the dower does attach but is divested on the exercise of the power of appointment: *Ray v. Pung* (1822), 5 B. & Ald. 561, 5 Madd. 310; *Armour on Real Property*, 2nd ed., p. 114.

And it was thought that the same result obtained where the conveyance was made direct to the husband, without the intervention of a third person, to such uses as he should by deed, etc., appoint and in default of and until appointment to him in fee.

But, owing to doubts being cast upon this doctrine by the learned author of *Armour on Real Property*, 2nd ed., p. 114,

note *j*, the Courts have recently declined to force such a title upon an unwilling purchaser without notice to the wife of the grantee to uses: *Re Osborne and Campbell* (1918), 15 O.W.N. 48; *Re Cooper and Knowler* (1920), 19 O.W.N. 27, 123; *Re Strauss and Fierstein* (1924), 26 O.W.N. 304; *Re Morris and Chertkoff* (1925), 56 O.L.R. 665. Logie, J.
1925.
RE HAZELL.

It is highly unsatisfactory that this state of affairs should continue and desirable that the right of a wife under such a conveyance should be authoritatively decided.

The divesting of the inchoate right of dower of Marshall's wife depends upon whether the common law seisin in fee and the power could co-exist in him at the same time.

Maundrell v. Maundrell (1805), 10 Ves. 246, is express authority for holding that a general power of appointment over the whole estate may subsist in the same person who has the fee at the same time; and *Goodill v. Brigham* (1798), 1 B. & P. 192, was in the *Maundrell* case commented on with such disapproval as to render it entirely unreliable as an authority: Farwell on Powers, 3rd ed., p. 45.

Marshall, by the execution of the deed to Brown, exercised his power of appointment; and, although until the exercise of that power he was seised of an inheritance in fee in possession, upon his execution of the power Brown came in as if named in the conveyance from Cooper, and so Brown's right is paramount to any inchoate right of dower in Marshall's wife. See the judgment of Lord Chancellor Eldon in *Maundrell v. Maundrell*, 10 Ves. at p. 263, adopted by Draper, C.J., in our own Court in *Lyster v. Kirkpatrick* (1866), 26 U.C.R. 217, at p. 228; Leith's Blackstone (1864), p. 87.

The inchoate right of dower in Brown's wife depends upon the nature of the estate which he acquired.

It is argued that, by executing a deed to Brown to such uses as Brown might by deed, will, or mortgage appoint, Marshall engrafted a use upon a use which the Statute of Uses would not execute; and so Brown was a trustee for the person to whom he appointed; and, not dying beneficially entitled, his wife has no dower: the Dower Act, R.S.O. 1914, ch. 70, sec. 4.

This contention takes no account of the peculiar qualities inherent in powers and how these are affected by the Statute of Uses, 27 Hen. VIII. ch. 10. Marshall and Brown both took under the statute (*Savill Bros. Ltd. v. Bethell*, [1902] 2 Ch. 523), being seised to the use of another.

If A., seised in fee simple, conveyed to B. in fee to the use of

Logie, J. C. in fee to the use of D. in fee, the privity or confidence existed
1925. in the first instance between B. and C. and then between C. and
RE HAZELL. D., but on account of the intervention of C. there was not any
direct use, trust, or confidence between B. and D., and B. could
not be said to be seised to the use of D.

In other words, the statute only executed one use or supplied one conveyance. A. could not give any legal ownership to D., because C. did not take any seisin but only a use, and could not acquire seisin save by the statute, which was deemed *functus* when it divested the seisin from B. to C.

So in order to pass the legal ownership thus acquired by C. from him to D., there was required a new conveyance by C. to D. (Jones's Law of Uses (1862), pp. 24, 25), and it would make no difference if the uses were granted by one or more instruments. But, where an estate is limited to such uses as A. shall appoint, an appointment by A. to such uses as B. shall appoint is valid and effectual (where there is a general power equivalent to absolute ownership) to pass the legal estate to B.'s appointee.

The statute does not operate with effect till the last power is exercised. The seisin originally created waits until estates are raised by B.'s power, and when this last power is exercised the statute transfers the legal estate: Farwell, 3rd ed., p. 505; Sudgen, p. 196.

Here the estate is limited to such uses as Marshall shall appoint. He, by virtue of his power, appointed to Brown to such uses or as Brown should appoint.

When Brown appointed in fee to Hazell, the original seisin was attracted, and the statute transferred the legal estate to Hazell, and the right to dower of Brown's wife is defeated, because the necessary element of seisin in Brown is absent.

Marshall, by appointing to Vila by way of mortgage, did not exhaust his power. The extent to which such an appointment operates depends entirely upon the intention to be collected from the deed taken as a whole; and, if there is no indication of intention, there is a presumption that nothing more than a mortgage was meant, and the equity of redemption is not affected: Halsbury's Laws of England, vol. 23, para. 54.

By sec. 67 of the Registry Act, R.S.O. 1914, ch. 124, every certificate of payment or discharge of a mortgage shall, when registered, be as valid and effectual in law as a conveyance to the mortgagor, his heirs and assigns, of the original estate of the mortgagor therein.

It was not seriously contended that by the discharge of the

Vila mortgage Brown became vested of an estate in the land different in quality or attributes from that which Marshall had. He had, in the words of the statute, "the original estate of the mortgagor therein." On the registration of the discharge the title was placed in *statu quo ante*, and Brown's wife thereby acquired no inchoate right of dower. It did not attach by virtue of the statutory reconveyance.

Logie, J.
1925.
RE HAZELL.

As the application is launched with a view to an appeal which will settle the law in Ontario on the points raised, the parties do not ask for costs.

[Upon appeal to a Divisional Court of the Appellate Division, the above decision was, on the 5th June, 1925, varied in one respect and in all others affirmed: see 28 O.W.N. 308. The reasons of the Divisional Court will be reported in due course.]

[ROSE, J.]

BESINNETT v. WHITE.

1925.
April 9.

Covenant—Restriction as to Use of Land Sold—Action to Enforce—Interest of Plaintiff—Ownership of other Land—Use of Land for Purposes other than Residential — Interpretation of Covenant—Whether Successor in Title of Covenantor Bound—"Assigns" not Mentioned—Notice and Knowledge—Equitable Right—Acquiescence—Estoppel—Declaration—Injunction—Costs.

Upon the purchase of land from the plaintiff, the defendant's predecessor in title (B.) covenanted with the plaintiff not to erect thereon a store or workshop and to use the land as a residence only. When the plaintiff conveyed to B. and took from him the covenant, she was the owner of adjoining land capable of being benefited by that covenant. Before the defendant bought the land, he had notice and full knowledge of the covenant:—

Held, that the words of the covenant could not be interpreted as meaning merely that when a building should be erected on the land it should be used for no purpose except that of a residence—in reality it was a covenant not to use the land for any other purpose than that of a residence.

(2) That, although the covenant was not expressed to be made on behalf of B. and his assigns, it was not to be construed as relating to B.'s personal acts only. A restrictive covenant of this sort is enforced against the covenantor's successor in title, not because he is in any sense a party to it, but because, if he had notice of it when he acquired title, it would be inequitable to permit him to use the land in a manner inconsistent with the covenant. If the assigns take with notice, the covenant will be enforced against them unless there is something to indicate that the covenant was intended to bind the covenantor alone.

(3) The fact that the legal title to the adjoining land had not been conveyed to the plaintiff and that her ownership did not appear upon

1925.

BESINNETT.

v.

WHITE.

- the registry, either at the time of the sale to B. or at the time when the defendant bought from B., was unimportant—she was the real owner, and the defendant knew of B.'s covenant.
- (4) The character of the neighbourhood had not so changed that it would be unjust to enforce a restriction against using the land for purposes of business.
- (5) The case did not come within the class of cases in which the Court, because of laches or acquiescence on the part of the plaintiff, has refused to interfere to restrain a breach of the covenant.
- (6) The question here was not as to the enforcement of a legal right; and the defendant, to answer the plaintiff's appeal to the equitable jurisdiction of the Court, must shew something analogous to what would disentitle a plaintiff to invoke that jurisdiction in aid of a legal right.
- (7) The plaintiff was entitled to a declaration that no "store or workshop" might be erected upon the land in question, and to an injunction restraining the defendant, who carried on a business in a shop upon adjacent land, from carrying on business on the land in question, by bringing motor cars there for repair or for supplies of gasoline, etc., or by allowing persons bringing supplies to come on the land with their vehicles. The plaintiff had not acquiesced in the defendant's use of the land for purposes prohibited by the covenant, and the equities were all with the plaintiff.

THIS was an action to enforce a covenant by which, upon the purchase of certain land from the plaintiff, the defendant's predecessor in title covenanted with the plaintiff "not to erect on the said premises a store or workshop and to use the said lands as a residence only."

The action was tried by ROSE, J., without a jury, at London.
J. W. G. Winnett, for the plaintiff.
W. B. Henderson, for the defendant.

April 9. ROSE, J.:—The land in question is a vacant lot having a frontage of 42 feet on Wortley-road in London. The plaintiff acquired title to it in October, 1904, by a conveyance from her sister, Hannah Slater (exhibit 9). At that time Mrs. Slater owned not only the 42-foot parcel but also some land lying south of it, her title (or her title to the part bounded on the north by the land in question in the action) having been acquired in 1902 by conveyance from one James (exhibit 13). In 1914, Mrs. Slater being indebted to the plaintiff and unable to pay what she owed, it was agreed between her and the plaintiff that the plaintiff should have the last mentioned land for the debt. This agreement was not put into writing, and no conveyance was made at the time; and when a conveyance was made by Mrs. Slater in 1919 it was to her son Ralph (exhibit 12), and he did not convey to the plaintiff until a year later, and in the meantime he had mort-

gaged the land to a loan company to secure a loan of \$3,000 (exhibit 11); but the plaintiff does not live in Ontario, and Ralph Slater was her attorney, and I see no reason to doubt the statement of the two sisters that as between them the land belonged to the plaintiff from 1914 onwards and that Mrs. Slater's occupancy was as tenant to the plaintiff. Therefore, I think that, when the plaintiff conveyed the land here in question to one Brown in 1919 (exhibit 1), and took from Brown the covenant now sought to be enforced, she was the owner of adjoining land capable of being benefited by the covenant, and that the covenant was exacted for the benefit of that adjoining land, as she says it was.

Brown owned land immediately to the north of the land conveyed to him by the plaintiff. On it was a shop in which he carried on business as a dealer in hardware. The plaintiff had intended to build a house on the land which she sold to Brown, but when she had made the sale she built her house on the land to the south, and this house she has allowed Mrs. Slater to occupy. She visits Mrs. Slater from time to time, but, as already stated, she does not live in Ontario.

In 1919 the defendant took a lease of the shop from Brown for 5 years, and he has been carrying on business there; and in October, 1924, he bought the land in question from Brown and had it conveyed to him. Before he became the owner of the vacant land he had made some use of it in connection with his business, as by allowing customers to whom he sold gasoline or oil or parts for their motor cars to place the cars on it while his employees were fitting the parts or making minor repairs; and the tank-waggon in which his supplies of gasoline and oil are brought to him are driven on to the land for unloading. Also rubbish is burnt there, and on one or two occasions damage has been done to the plaintiff's fence or hedge. The plaintiff seeks an injunction against the continuance of this sort of use of the land, or indeed against any use of it except as a residence. She seeks relief also in respect of the maintenance of a gasoline-tank and pump; but the evidence is clear that these are in the highway and not on the land in question; and, whether the permission to maintain them given by the municipality to the defendant is or is not valid, no order in respect of them can be made in this action.

Before the defendant bought the land, he had not only the notice which the Registry Act attributes to him, but full knowledge of the covenant by Brown contained in the deed by which the plaintiff conveyed to Brown; but he was advised that the

Rose, J.

1925.

BESINNETT.
v.
WHITE.

Rose, J.

1925.

RESINNETT.

v.

WHITE.

covenant could not be enforced, and his contention is that, upon its true construction, there has been no breach of it, and that for various reasons it is unenforceable by the plaintiff.

The questions of construction are two. First, it is suggested that the covenant relates only to the type of building to be erected and does not touch the use of the land in its natural state. This seems to me to be unsound. The express negative covenant is against erecting a store or workshop, and the words, "to use the said lands as a residence only," which follow, are in form more or less affirmative, but in reality the covenant to use as a residence only is a covenant not to use for any other purpose than that of a residence, and there seems to be nothing in the fact that these words follow the covenant against erecting buildings of a certain type which can support the argument that the ordinary meaning of the words themselves is to be cut down and that they are to be interpreted as meaning merely that when a building is erected it shall be used for no purpose except that of a residence.

The second point is that the covenant is not expressed to be made on behalf of Brown and his assigns, and that it ought to be construed as relating to Brown's personal acts only. At the trial this seemed to me to be formidable, but further consideration has convinced me that it is not so. A restrictive covenant of this sort is enforced against the covenantor's successor in title, not because he is in any sense a party to it, but because if he had notice of it when he acquired his title it is inequitable that he should be permitted to use the land in a manner inconsistent with it. It is true that the covenant is usually expressed to be made on behalf of the covenantor, his heirs, executors, administrators, and assigns, and that consequently most of the cases in which the position of a purchaser has been considered are cases in which the covenant purported to bind him; but there are cases, e.g., *Long Eaton Recreation Grounds Co. Ltd. v. Midland Railway Co.* (1901), 85 L.T.R. 278, in which the assigns have been bound although not named, and I think that the rule must be that, if they take with notice, the covenant will be enforced against them unless there is something—as there was in *In re Fawcett and Holmes's Contract* (1889), 42 Ch.D. 150—to indicate that the covenant was intended to bind the covenantor alone.

One of the arguments against the right of the plaintiff to the assistance of the Court is founded upon the judgment in *London County Council v. Allen*, [1914] 3 K.B. 642, and the numerous cases in which it has been applied. It is contended that, when she had conveyed the land in question to Brown, the plaintiff had

no land left which was intended to be benefited by the covenant. This has been dealt with already, and my finding that she was the owner of the land upon which she has built the house in which Mrs. Slater lives has been stated. The fact that the legal title had not been conveyed to her and that her ownership did not appear upon the registry at the time of the sale to Brown, seems to me to be unimportant. The important thing is that she was the real owner and that the defendant knew of Brown's covenant.

Another suggestion is that the character of the neighbourhood has changed and that it would be unjust at the present time to enforce a restriction against using the land for purposes of business. This fails upon the evidence: there has been no material change.

The only other point that need be considered is that the plaintiff raised no objection while the defendant, as tenant to Brown, was using the land much in the manner in which he has used it since he became the owner, and that she is estopped from asserting that the defendant, as owner, is bound by the covenant; or, at least, that the plaintiff has lost her right to invoke the equitable jurisdiction of the Court. As to this, it is to be observed that the plaintiff does not live in London except in the summer; that she says she was not aware that the defendant had taken a lease from Brown; that there is no suggestion that she was aware of the defendant's intention to purchase; so that there is no question of her having stood by and allowed the defendant to expend money or otherwise to alter his position in the belief that she had no objection to his using the land in the way now complained of; and that certainly there is nothing to preclude her from objecting to the erection of a building of the class prohibited by the covenant. In these circumstances, it does not seem to me that the case is brought within the class of cases in which the Court, because of laches or acquiescence on the part of the plaintiff, has refused to interfere to restrain a breach of the covenant.

If the question were as to the enforcement of a legal right, the case would be reasonably clear: it would be said, as in *Attorney-General v. Leeds Corporation* (1870), L.R. 5 Ch. 583, 595, that the mere fact of a plaintiff bearing an evil for a certain time will not prevent the Court from saying that the evil must be arrested; or, as in *Wilmott v. Barber* (1880), 15 Ch. D. 96, 105, that a man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set them up; and it would be said also that the degree of delay which

Rose, J.

1925.

DESINNETT.

v.

WHITE.

Rose, J.
1925.
BESINNETT.
v.
WHITE.

might stand in the way of the success of a motion for an interlocutory injunction would by no means necessarily be an answer to an action: *Black v. Imperial Book Co.* (1903), 5 O.L.R. 184, 195; and that some at least of the elements necessary to constitute the kind of acquiescence that is an answer were not to be found: *Russell v. Watts* (1883), 25 Ch.D. 559, 577.

The question here, however, is not as to the enforcement of a legal right, for there is no contract between the plaintiff and the defendant. The plaintiff invokes the aid of the Court, alleging that it is inequitable that the defendant should be permitted to put the land to a use to which his predecessor in title covenanted that it should not be put, and the defendant answers that in the circumstances of the case the plaintiff is acting unfairly in trying to prevent him from using it in any way that he may desire; and the question is, whether the defendant has established that his right to ask the Court to stay its hand is as great as the plaintiff's right to ask the Court to restrain the defendant. Upon that question the cases to which reference has been made are not directly in point, and no case directly in point has been cited to me, but still, in my opinion, the cases cited and other cases to the same effect do furnish a guide: I think that something analogous to what would disentitle a plaintiff to invoke the equitable jurisdiction of the Court in aid of a legal right must be shewn even when the right sought to be enforced is equitable rather than legal.

That being my view as to the rule to be applied, I think that the plaintiff in this case is entitled to succeed. Certainly, she is entitled to a declaration that no "store or workshop" may be erected on the land in question—she has done nothing that tells in any way against her right to such a declaration—and I think that she is entitled to an injunction to restrain the defendant from carrying on business on the land, by bringing motor cars there for repairs or for supplies of gasoline, oil, or air, or by allowing persons who are bringing the defendant's supplies of gasoline or other commodities to his shop to come on to the land with their vehicles. All that can be said against her right to such an injunction is, that she bore the evil for a certain time without complaint. It cannot be said that she had any reason to suppose that her forbearance was considered by the defendant to be equivalent to a declaration on her part that she had no right to complain, or that she had any knowledge that the defendant was about to buy the land from Brown believing that the plaintiff had abandoned her right to have the land used "as a residence

only." Indeed, it is difficult to believe that the plaintiff's inaction was an inducement to the defendant to purchase; the probability is that when the defendant found that the plaintiff's registered title to the land occupied by Mrs. Slater dated only from September, 1920 (exhibit 10), he assumed (or his solicitor did), without asking the plaintiff what the fact was, that at the time of the sale to Brown the plaintiff had no land which could be benefited by the covenant, and that upon that assumption he proceeded. It is not likely that the defendant was advised that, because the plaintiff theretofore had not protested against the use of the land for purposes of business, he might be confident that the Court would not at her instance restrain the continuance of such use. Deliberately, the defendant took his chance of success in the attempt which he intended to make to use the land in the way in which Brown had agreed not to use it; he knew that the plaintiff was the registered owner of the house occupied by Mrs. Slater, but he thought that he could defeat her right to have Brown's covenant enforced by proving that at the time of the sale to Brown she did not own the land on which that house now stands; it turns out that the plaintiff had owned that land ever since 1914; the loop-hole that the defendant thought he saw is not open; the equities are all with the plaintiff; there is nothing in the least dishonest in her attempt to enforce the condition which she imposed upon Brown when she conveyed the land to him; and, in my opinion, there is no reason why the Court should refuse her request for an injunction.

Until the amendment of the pleadings was made at the trial, the plaintiff's chief complaint was in reference to the gasoline-pump in the street, although she asked generally for an order restraining the use of the land for purposes other than residential; but the defendant pleaded acquiescence, and alleged that the plaintiff had parted with her interest in the lands, and the case was fought out on the issue thus raised and upon the additional issue (not expressly raised by the pleadings) as to the time at which the plaintiff acquired her title to the land occupied by Mrs. Slater. I think, therefore, that the plaintiff ought to be paid her costs, notwithstanding her failure to establish her case as to the pump.

Rose, J.

1925.

BESINNETT.

v.

WHITE.

[ORDE, J.A.]

1925.

FITZPATRICK V. THE KING.

April 17.

Crown—Petition of Right—Whether Suppliant Entitled to Patent for Crown Lands without Reservation of Water-rights—Fraud—Evasion of Regulations—Contract—Performance of Settlement Duties—Approval of Minister—Practice—Amendment—Parties—Absence of Jurisdiction in Court to Compel Crown to Issue Letters Patent—Petition of Right Act. R.S.O. 1877, ch. 59, sec. 2—Judicature Act, R.S.O. 1897, ch. 51, sec. 26(7).

The suppliant—improperly styled in the petition and proceedings “the petitioner”—by his petition of right prayed that it might be declared that he as to a half-lot of Crown lands and his brother as to another half-lot, both in the township of M., were in 1906 each entitled to a patent from the Crown without any reservation of water-rights, easements, and privileges; that such patents be ordered to issue to the suppliant; and that the Crown be ordered to compensate the suppliant in respect of moneys paid and expended in connection with the lands and lots by the refusal of the Crown to grant patents.

The two half-lots were contiguous and formed one parcel of 320 acres, across which a stream flowed, part of which was a rapid, constituting a valuable water power.

By an order in council of May, 1891, the Commissioner of Crown Lands was authorised to put the lands in the township of M. up for sale to actual settlers at 50 cents per acre, subject to limitation as to quantity and upon certain conditions as to residence, clearing, etc. The Commissioner adopted the policy of selling no more than 160 acres to each settler, except in special cases. In 1898 the Ontario Legislature, by 61 Vict. ch. 8, empowered the Commissioner to reserve from sale any water power or privilege on the Crown lands of the Province and sufficient land in connection therewith for the erection of buildings and plant. By an order in council of June, 1898, certain regulations for the disposal of water powers were approved of, one being that the regulations should not apply to water privileges which in their natural condition at the average low stage of water have not a greater capacity than 150 horse power.

The suppliant, it appeared, in order to evade the effect of the rule that no settler could purchase more than 160 acres, when purchasing the interest of one J. in the two half-lots, took an assignment of J.'s interest in one half-lot to himself and of the other to his brother, and in applying for patents for the lots made false statements in his affidavits:—

Held, that the suppliant, in concealing from the Minister the fact that he (the suppliant), and not his brother, was the real owner of an interest in one of the half-lots, was evading the regulations and committing a fraud upon the Crown.

(2) The contract, if there was a contract, between the suppliant and the Crown, was always subject to the water power regulations as set forth in the order in council of June, 1898; and, as the power upon the lands in question exceeded 150 horse power, the Crown was entitled to the water power and to refuse the suppliant a patent without such reservation.

(3) The Minister's so-called approval of the suppliant's performance of his settlement duties was made without full information as to the

real nature thereof; and, had the Minister been aware of the character of the performance, no approval would have been given.

- (4) Provisions in the statutes or rules of practice which in general terms import into proceedings against the Crown rules of procedure applicable to ordinary cases between subject and subject, are not to be so construed as to impair the prerogatives of the Crown.

Flextume Sign Co. v. Macey Sign Co. (1922), 51 O.L.R. 595, *Crombie v. The King* (1922), 52 O.L.R. 72, *Ruffy-Arnell and Baumann Aviation Co. v. The King*, [1922] 1 K.B. 599, 600, and *Badman Brothers v. The King*, [1924] 1 K.B. 64, followed.

A motion to add the suppliant's brother as a co-suppliant was refused. The extent of the power of the Court to amend a petition of right without fiat considered.

An amendment made at an earlier stage of the proceedings by which a power company, to which a lease of the water power and a license of occupation of certain lands in connection therewith had been granted by the Crown, was added as a defendant, was approved.

- (5) Assuming that the suppliant had established a contract on the part of the Crown to sell him the lands in question, he could not upon a petition of right obtain a decree for specific performance against the Crown—the Court has never possessed the power to compel the Crown to issue letters patent.

The Ontario Petition of Right Act, R.S.O. 1877, ch. 59, sec. 2, the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 26(7), kept in force by virtue of sec. 3 of the present Judicature Act, R.S.O. 1914, ch. 56, and earlier statutes, considered.

Review of the decided cases.

Canada Central Railway Co. v. The Queen (1873), 20 Gr. 273, explained and distinguished.

Clarke v. The Queen (1886), 1 Can. Ex. C.R. 182, followed.

PETITION of right.

March 23, 24, 25. The petition was tried by ORDE, J.A., without a jury, in Toronto.

G. T. Walsh, for the suppliant.

F. P. Brennan, for his Majesty, the respondent.

G. H. Kilmer, K.C., for the Wendigo Power Company Limited (brought in by notice under Rule 741).

April 17. ORDE, J.A.:—For some unexplained reason, the suppliant has been styled in the petition of right, in the style of cause, and throughout the pleadings, as "the petitioner." By Rule 738 *et seq.* and Forms 125 to 127, the proper style is "the suppliant." See also the Dominion Petition of Right Act, R.S.C. 1906, ch. 142, and Clode on Petition of Right, at, *inter alia*, pp. 157 and 195.

The suppliant by his petition prays that it may be declared that he, as to the north half of lot 1 in concession 3 in the township of Marter, and his brother Alfred Fitzpatrick as to the south half of lot 1 in concession 4 of that township, were in the year 1906 each

1925.

FITZPATRICK
v.
THE KING.

Orde, J.A. entitled to a patent from the Crown without any reservation what-
1925. ever of certain water rights, easements, and privileges; that such
FITZPATRICK patents be ordered to issue to the suppliant; that the Crown be
v. ordered to compensate the suppliant in respect of certain moneys
THE KING. paid and expended in connection with such lands and lost by the
refusal of the Crown to grant him the patents; for costs; and for
other relief.

The relief claimed by the petition is quite unusual. Except for the judgment in *Canada Central Railway Co. v. The Queen* (1873), 20 Gr. 273, which turned upon a special Act of the Legislature and to some extent upon the issues raised by the Crown, and which will be discussed later, no case was cited for the proposition that the Court has power to order or decree the issue of a patent by the Crown.

Concession 4 in the township of Marter lies north of concession 3, and the two half-lots in question are contiguous and form one parcel of land with an area of 320 acres. The east branch of the Blanche or White river flows in a north-westerly direction across the parcel. For several miles before reaching the easterly boundary of the lots, the Blanche takes the form of a wide expansion called Wendigo lake. The lower end of the lake extends for some distance into the parcel in question and then becomes again a narrow stream. At the mouth of the lake the stream is broken by two islands, thereby making three streams or channels, which again become one a few hundred feet below. From the mouth of the lake, throughout the length of the three small streams, and onwards to a point several hundred feet below the islands, the river is one long rapid, so that from the lake-level to the still water below the rapid, there is a drop varying, according to different estimates, from 37 to 40 feet. This rapid constitutes a valuable water power.

By an order in council of the 29th May, 1891, the Commissioner of Crown Lands was authorised to put the lands in the township of Marter, as well as those in several other townships in the district of Temiskaming, up for sale to actual settlers at 50 cents per acre, subject to limitation as to quantity, and upon certain conditions as to residence, clearing, etc.

By a memorandum of the 13th October, 1896, made by Mr. Aubrey White, the then Deputy Commissioner of Crown Lands, and approved by Mr. (afterwards Sir) J. M. Gibson, the then Commissioner (exhibit 13), the policy of selling no more than 160 acres to each settler, except in special cases, was adopted. There was no evidence that this policy was embodied in any other

regulation or was expressly approved by order in council, but it was a matter which, under the authority given by the order in council of the 29th May, 1891, and otherwise vested in the Commissioner by the Public Lands Act, was quite within his power to determine. That it was a well-known rule of the Department of Crown lands to restrict the area which could be purchased by any one person, under conditions requiring the performance of settlement duties, to 160 acres, is disclosed by the evidence of the suppliant himself and his own admission that he had to adopt means to deceive the Department as to the quantity of land he was acquiring because of what he termed "this stupid regulation." I shall later refer more fully to this feature of the suppliant's case.

Orde, J.A.

1925.

FITZPATRICK
v.
THE KING.

In 1898 the Legislature passed an Act, 61 Vict. ch. 8, empowering the Commissioner of Crown Lands to reserve from sale any water power or privilege on the Crown lands of the Province and a sufficient area of land in connection therewith for the erection of buildings and plant, together with the right to lay out and use the necessary roads, and, subject to regulations to be approved by the Lieutenant-Governor in Council, to make terms and conditions for the sale, lease, and development of such water powers.

This Act was doubtless passed to give public sanction to the policy of disposing of water powers separately and not as part of the public lands, but there was really nothing, so far as I am aware, to prevent the Government, as a matter of administration, from following out this policy without any special statutory authority.

In furtherance of this policy, an order in council was passed on the 21st June, 1898, approving of certain regulations for the disposal of water powers. The only provision in these regulations which is of any consequence in the present case is that which states that the regulations "shall not apply to water privileges which in their natural condition at the average low stage of water have not a greater capacity than 150 horse power."

The chronology of the titles to the two half lots is of importance, and it will be more convenient first to set forth that relating to each half lot separately and then to note the relationship to each other.

North Half of Lot 1, Concession 3.

14th February, 1902, one Dempsey applies to purchase.

4th March, 1904, Dempsey assigns his interest to one William Judge, but the assignment is not forwarded to the Department

Orde, J.A. until 25th May, 1905, when it is forwarded by the Crown lands agent.
1925.

FITZPATRICK
v.
THE KING. 3rd October, 1906, William Judge assigns his interest to James Fitzpatrick, the suppliant.

23rd October, 1906, this assignment is received by the Department in Toronto from Messrs. McEwen & Morgan, solicitors, New Liskeard.

South Half of Lot 1, Concession 4.

21st July, 1902, one Ferguson applies to purchase.

19th June, 1905, Ferguson assigns to William Judge (the same William Judge as mentioned above), but the assignment is not forwarded to the Department.

3rd October, 1906, William Judge assigns to Alfred Fitzpatrick, a brother of the suppliant.

31st October, 1906, Ferguson's assignment to Judge of the 19th June, 1905, is received by the Department from Messrs. Denton, Dunn, & Boulton, solicitors, Toronto.

28th November, 1906, Judge's assignment to Alfred Fitzpatrick of the 3rd October, 1906, is received by the Department in Toronto from Messrs. McEwen & Morgan, New Liskeard.

Neither Dempsey, nor Ferguson, nor Judge, had, up to the 3rd October, 1906, when Judge assigned to the two Fitzpatricks, performed all the settlement duties required by the regulations, and there were duties as to clearing and cultivating still to be performed before Judge or any assignee of his could claim a patent to either half lot.

Now it is to be observed that when Judge, on the 19th June, 1905, acquired Ferguson's interest in one half lot, he was already the holder, under the assignment from Dempsey of the 4th March, 1904, of the other half lot, which (assignment) he had filed with the Department less than a month before. To have then sent the Ferguson assignment to the Department would immediately have risked the discovery of the fact that Judge was attempting to acquire as a settler two parcels of 160 acres each, contrary to the rule of the Department. And so the Ferguson assignment was not disclosed.

On the 3rd October, 1906, Judge sold all his interest in both half lots to the suppliant for a consideration of about \$7,000. But, as the settlement duties were not yet completed, the suppliant was in the same predicament as Judge, and could not risk the disclosure that he had acquired the two half lots by taking the assignment of both in his own name. So the assignment of the

original Ferguson half lot is taken in the name of his brother, Alfred Fitzpatrick. And, further to lessen the risk of discovery, notwithstanding the fact that the two assignments were executed on the same day, the suppliant is careful to see that the still unregistered assignment from Ferguson to Judge, and the two assignments from Judge to himself and to his brother, are all received by the Department on different dates, and also to have the Ferguson assignment to Judge forwarded by a firm of solicitors in Toronto, while the two assignments from Judge are forwarded by his solicitors in New Liskeard.

Orde, J.A.
1925.
FITZPATRICK
v.
THE KING.

Counsel for the suppliant made some effort to adduce evidence that Alfred Fitzpatrick had an interest in the lands sufficient to justify the taking of the assignment to him, but there was not a tittle of evidence to shew that Alfred Fitzpatrick had any interest whatever (other than that of a bare trustee) in the half lot assigned to him. On the contrary, the suppliant's own evidence was explicit that the moneys paid to Judge were wholly his, that the two half lots belonged to him, and to him alone, and that he had taken the assignment of one to Alfred to get over a "stupid regulation," as he expressed it on his examination for discovery, or the "foolish condition," as he put it at the trial, meaning by those expressions the rule restricting each settler to 160 acres.

That the course adopted was to blind the officials of the Crown Lands Department to the real facts was obvious, and the suppliant makes no real attempt to evade that issue, except by asserting that the fact was really known or ought to have been apparent to the Minister and other officials, and that no objection was then taken. This assertion of his that the Department knew he was the real purchaser is not borne out by the evidence.

In addition to the deception, which the bald recital of the steps taken to record the links in the chain of title itself discloses, there is the further fact that in the affidavits which the Department required as to the nature and extent of the settlement duties which had been performed by the then owners and their predecessors the suppliant makes a statement which is substantially untrue. Two affidavits sworn by him on the 7th December, 1906, were filed with the Department, one for each half lot. That dealing with the south half of lot 1 in the 4th concession states that "my brother Alfred Fitzpatrick of Wendigo . . . paid William Judge \$1,500 for the said lands on or about the 3rd October, 1906." This statement was untrue. The money paid to Judge was that of the suppliant and not Alfred's, and no casuis-

Orde, J.A.
1925.
FITZPATRICK
v.
THE KING.

tical argument that the hand that delivered the money to Judge was in fact Alfred's (the evidence did not even make it clear that this was the case) can relieve the suppliant from the ugly imputation that he deliberately swore to a falsehood which was intended to, and did, mislead the Department.

As I said at the trial, the charge that he has been deprived of his patents because of a breach of faith on the part of some Minister of the Crown comes with a bad grace from one who admits what cannot be described otherwise than as a fraud upon the Crown, in order to gain his own ends.

I might well dismiss the suppliant's petition for this reason alone, even if there were no other.

But the questions which the suppliant has raised are of some importance, and I ought, perhaps, to deal with them as well.

The suppliant rests his claim to relief upon the grounds: that when he or those under whom he claims made application to the Crown through the officials of the Crown Lands Department to purchase the lands, and their deposit on account of the purchase-price was accepted, there was constituted at once a contract between the applicants and the Crown for the sale of the lands to the applicants upon the condition that the balance of the purchase-price should be duly paid, and the settlement duties performed as required by the regulations; that the lands covered by the sale consisted of the acreage shewn by the official survey of the parcels purchased, and that, even if the survey excluded from the acreage so sold lands covered by water (as it did in case of the north half of lot 1, concession 3) the area so excluded was confined to the land under the waters of Lake Wendigo, and did not extend to the waters of the stream or streams flowing from it; that unless expressly reserved at the time of the application the water powers necessarily passed with the lands so sold, and could not, without breaking the contract, be afterwards reserved or excepted by the Crown; and that, even if under the Act of 1898 and the regulations as to water powers approved by the order in council of the 25th June, 1898, a reservation of the water powers was to be deemed to be implied in the contract, no such implication could arise in the present case because the water power did not in fact exceed 150 horse power.

The suppliant contends that, the balance of the purchase-price having been duly paid, and all the settlement duties performed, he is now entitled to the patents for the two half lots without any reservation whatsoever except as to the pine timber as set forth in the order in council of the 29th May, 1891.

As to the performance of the settlement duties, in addition to the evidence adduced at the trial he relies upon the alleged approval of the then Minister of Lands, the late Hon. Frank Cochrane, given on or about the 18th December, 1906, and the direction of the then Deputy Minister, Mr. Aubrey White, to prepare the patents.

Just what immediately followed this direction of the Deputy Minister in the Department is not apparent. It may be that when the official whose duty it was to prepare the patents came to look at the official plans and descriptions he became aware of the possible necessity of reserving the water power if it exceeded 150 horse power. At all events, on the 11th January, 1907, the Deputy Minister wrote to Messrs. Denton, Dunn, & Boulton, informing them that it had been found that there was a water power upon the land, and referring them to the regulations as to reservation if the power exceeded 150 horse power. They were informed that the patents could not go until the capacity of the power had been ascertained. On the 22nd January, 1907, the suppliant wrote to the Minister, informing him that about the time the lands had been purchased from Judge they (that is, he and his brother Alfred) had had the water power on the three streams running out of Lake Wendigo measured by Mr. Sinclair (this name was erroneously given for that of Mr. Smith), of Blair, Sinclair, & Smith, and that he had found that the largest of the three streams had only 112 horse-power. The Department then asked for Mr. Sinclair's (Smith's) report, and on the 31st January, 1907, the suppliant forwarded to the Department a statutory declaration which had already been made by James H. Smith, on the 24th November, 1906, wherein the effective horse power upon the so-called three streams was given as follows: that upon the most southerly stream, which is stated to be on the north half of lot 1 in the 3rd concession, at 89.96 h.p.; those upon the two other streams, which are stated to be upon the south half of lot 1 in the 4th concession, at 55.12 and 112.3 h.p. respectively. The total combined power was therefore 257.38 h.p. Smith's plan of the two half lots shews that the concession-line, which divides them, bisects the northerly island, and also cuts off a very small part of the larger southerly island, the greater part of which lies in the 3rd concession. The plan shews that, while the rapids in the southerly and middle streams commence in the 3rd concession, that in the northerly stream commences in the 4th concession, and that while the two northerly streams unite and become one in the 4th concession the united stream is bisected by the boundary

Orde, J.A.

1925.

FITZPATRICK
v.
THE KING.

Orde, J.A. where the southerly stream comes in, and then the completely
1925. united stream leaves the boundary and flows north-westerly across
Fitzpatrick the south half of lot 1 in the 4th concession. But it is quite
v. clear that the rapids which commence in the three streams or
The King. channels continue after their union as one long rapid for several
hundred feet below the meeting point at the foot of the islands.

On the 15th March, 1907, the Department notified the suppliant that, as the water power at the outlet of Lake Wendigo exceeded 150 horse power in its natural condition, it could not go with the lands, but would have to be taken up, together with a sufficient area of land for its proper development, under a separate lease, as provided by the water power regulations, a copy of which was enclosed to the suppliant.

Though this letter notified the suppliant that the water power must be reserved, there was a plain intimation to him to open negotiations with the Government for its acquisition under the water power regulations. The suppliant, however, declined to adopt this course, and refused to accept a patent with any reservations; and he apparently abandoned the lands and the whole project for some years.

In 1915 the Department of Lands instructed one of its agents to make inquiries as to the nature and extent of the improvements upon the two parcels, and upon receiving his report notified the suppliant and his brother that, if they had any representations to make as to why the sales should not be cancelled, they were to do so at once. This was followed by a voluminous correspondence between the Department and the suppliant and his solicitors. Application had been made by others for the water power, but, before granting it, the then Minister of Lands gave several opportunities to the suppliant to be heard, of which the suppliant failed to avail himself. Finally the Crown granted to the Wendigo Power Company Limited a lease of the water power and a license of occupation of certain lands in connection therewith.

By an assignment dated the 19th April, 1922, Alfred Fitzpatrick purported to assign and transfer to the suppliant all his title and interest in and to the south half of lot 1 in concession 4, and in and to all his claims and demands for compensation and damages by reason of the refusal of the Crown to grant him a patent for the lands, and the rights and easements belonging thereto in respect of Lake Wendigo and the east branch of the White or Blanche river. This assignment the Department refused to recognise.

Shortly afterwards the suppliant lodged his petition of right with the Provincial Secretary, and a fiat was granted.

Orde, J.A.
1925.

A statement of defence was delivered by the Attorney-General, by para. 18 of which it was submitted that the alleged assignment by Alfred Fitzpatrick to the suppliant was illegal and of no effect because of failure to comply with the provisions of subsec. 1 of sec. 60 of the Public Lands Act, as enacted by 11 Geo. V. ch. 15, whereby no assignment of an interest in public lands is valid unless approved in writing by the Minister.

FITZPATRICK
v.
THE KING.

When the case came on for trial on the 20th May, 1924, before Mr. Justice Logie, it was found that the suppliant had failed to notify the Wendigo Power Company, as required by Rule 741, and the trial was enlarged that this might be done. Leave was also given to his Majesty to amend the statement of defence by substituting and adding certain paragraphs, and the suppliant (doubtless because of the defence set up in para. 18 of the Crown's statement of defence) was also given leave to apply for a fiat to add Alfred Fitzpatrick as a suppliant, without prejudice to an application to be made at the trial to disallow the Crown's amendments if the fiat to add Alfred were not granted.

The suppliant thereupon served the Wendigo Power Company, under Rule 741, and this company delivered a statement of defence, but the suppliant failed in his efforts to procure a fiat to an amended petition of right with Alfred Fitzpatrick as a co-suppliant.

At the opening of the trial before me, counsel for the suppliant moved to add Alfred Fitzpatrick as a suppliant, and also to disallow the amendments to the Crown's defence allowed by Mr. Justice Logie's order. I reserved my decision upon these motions until the conclusion of the trial.

When the evidence came out as to the suppliant's having concealed from the Department his ownership of both parcels, I gave leave to the Crown to add a further paragraph to the defence, setting up fraud on the part of the suppliant.

The motion to add Alfred Fitzpatrick as a suppliant must be dismissed. As I pointed out in *Flexlume Sign Co. v. Macey Sign Co.* (1922), 51 O.L.R. 595, at pp. 598 *et seq.*, the power of the Court to amend a petition of right, if it can be exercised at all, must be limited to minor matters, and cannot go the length of allowing a suppliant to change the character of his claim, either by adding to it, or withdrawing part of it, or by adding parties as co-defendants with the Crown.

In *Ruffy-Arnell and Baumann Aviation Co. v. The King*,

Orde, J.A. [1922] 1 K.B. 599, McCardie, J., held (at p. 609) that the Court
1925. might allow a petition of right to be amended without fiat, if the
Fitzpatrick proposed amendment were a "mere change of date, or of amount,
v. or a mere variation in the formulation of a contract;" but that, if
The King. the substance of the case is changed by the proposed amendment,
the Court may refuse its aid unless the consent of the Attorney-
General is given. This decision was approved by the Court of Ap-
peal in *Badman Brothers v. The King*, [1924] 1 K.B. 64.

These authorities, as well as that of the Appellate Division affirming my judgment in the *Flexlume* case, and also of the Appellate Division in *Crombie v. The King* (1922), 52 O.L.R. 72, make it clear that provisions in the statutes or rules of practice, which in general terms import into proceedings against the Crown rules of procedure applicable to ordinary cases between subject and subject, are not to be so construed as to impair the prerogatives of the Crown.

In this case the desire to add Alfred Fitzpatrick as a suppliant does not arise from any transmission of interest from the suppliant to him *pendente lite*, in which event possibly the Rules might allow his addition or substitution as a party. It arises from the difficulty confronting the suppliant as a result of his assertion of his brother's title and interest under an illegal and ineffective transfer. If Alfred has any cause of action against the Crown, it must of necessity be distinct from that of the suppliant. Nor can the suppliant's motion be regarded as an attempt to overcome some technical difficulty as to lack of parties such as might arise if the suppliant were suing upon an equitable assignment and had failed to join his assignor. Alfred's cause of action, if any, being separate, must be treated as a distinct issue as between himself and the Crown. If the Crown see fit to refuse him a fiat, then the Court must not, by the expedient of adding him as a co-suppliant to an existing petition, accomplish indirectly what the Crown declines to allow him to do directly. Having regard to the fact that the evidence discloses that Alfred Fitzpatrick had no real interest in the subject-matter of his assignment to the suppliant, but was in fact a bare trustee for him, he can have no cause of action whatever against the Crown, and the Crown's refusal to grant him a fiat would seem to be fully justified. The suppliant alone has any interest in the subject-matter of the present action. Joining Alfred would really be a mere formality and would avail the suppliant nothing. The suppliant's attempt to extricate himself from the difficulty arising from his own effort to deceive the Government only leaves him floundering more deeply in the morass.

Nor do I see any good ground for disallowing the amendments to the Crown's defence allowed by Mr. Justice Logie. There is no suggestion that the applicant is taken by surprise or is embarrassed beyond the embarrassment resulting from the awkward situation in which he finds himself in consequence of his attempt to conceal the truth from the officers of the Crown. The amendments must be allowed to stand.

Orde, J.A.

1925.

FITZPATRICK

v.

THE KING.

Assuming for the moment that the suppliant has established a contract on the part of the Crown to sell him the lands in question, which in an action against a fellow-subject would entitle him to specific performance, can he upon a petition of right obtain any such relief against the Crown? It is, I think, clear upon principle and authority that he cannot. Where petition of right lies at all with respect to realty it is limited, speaking broadly, to the recovery by way of restitution to the suppliant of lands of which the Crown has taken possession without right or title. In other words; the suppliant must have had a title superior to any claim of the Crown. By sec. 2 of the Ontario Petition of Right Act of 1877 (R.S.O. 1877, ch. 59) the word "relief" comprehends "every species of relief claimed or prayed for . . . whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages or otherwise." There is nothing in this definition to warrant the suggestion that petition of right lies to compel the Crown to issue letters patent. That the Court will not compel the Crown to grant or convey lands where it holds the legal title is treated as fundamental in numerous cases. For example, in *Hodge v. Attorney-General* (1838), 3 Y. & C. Ex. 342 (in which case the Court exercised its power to bind the Crown by a declaratory judgment against the Attorney-General where its interest was merely equitable), Alderson, B., says, at p. 346, "Here the legal estate is vested in the Crown, and I do not know any process by which this Court can compel the Crown to convey that legal estate." In *Clarke v. The Queen* (1886), 1 Can. Ex. C.R. 182, an attempt was made to procure a judgment to compel the Crown in the right of the Dominion to issue letters patent to certain lands. The petition was dismissed by Sir William Ritchie, C.J., upon demurrer, in a judgment of three lines, upon the simple ground that a "petition of right will not lie to compel the Crown to make a grant of lands."

Where lands are the subject of a petition of right the judgment is that "the hands of the Crown be removed, and possession restored to the petitioners," or, as it is termed, a judgment of

Orde, J.A. "amoveas manus:" Chitty's Prerogatives of the Crown (1820),
1925. p. 348. While the form of the judgment has been changed in
modern times (see Robertson's Civil Proceedings by and against
the Crown, p. 395), the relief granted is not greater.

FITZPATRICK
v.
THE KING.

But the suppliant contends that by para. 7 of sec. 26 of the Ontario Judicature Act of 1897, R.S.O. 1897, ch. 51, which is kept in force by virtue of sec. 3 of the present Judicature Act, R.S.O. 1914, ch. 56, the Court has power "to decree the issue of letters patent from the Crown to rightful claimants."

Now it is perhaps useful to observe at the outset that this section merely confers jurisdiction. In its origin the section merely provided the machinery for the application of already existing legal and equitable principles, but was not intended to, and did not, create rights where none existed before. Section 26 first appears in the Act of 1837, establishing a Court of Chancery in this Province, 7 Wm. IV. ch. 2, and is the same, except for a slight rearrangement of some of the matters dealt with and the omission of the proviso at the end, as sec. 2 of that Act. By that Act there was established for the first time in this Province a Court with full power to administer the principles of equity as administered by the Court of Chancery in England. Section 2 defines the jurisdiction and power of the new Court, and declares that it "shall have jurisdiction, and possess the like power and authority as, by the Laws of England, are possessed by the Court of Chancery in England, in respect of the matters" thereafter enumerated. Then follows a long list of matters, substantially as it now appears in sec. 26, which reads like the table of contents of any standard text-book on Equity, indicating that it was intended to confer upon the newly established Court all the peculiar and special powers of a Court of Equity as administered by the English Court of Chancery as to all the matters so enumerated. But the laws so to be administered were the laws of England relating to those matters, and, beyond having gained a new tribunal to which they might resort, persons aggrieved were not entitled to any other rights or remedies (except in the case of mortgages, as to which sec. 11 made certain unusual and special provisions) than they would have possessed had their cases fallen to be determined in England.

Among the matters enumerated in sec. 2 of the Act of 1837 was this, "to decree the issue of letters patent from the Crown to rightful claimants." Keeping in mind that all that was intended by this section was to confer upon the Court the same power and authority over this subject-matter as that possessed by

the English Court of Chancery, the first inquiry necessarily is, what power had the Court of Chancery to decree the issue of letters patent by the Crown? The suggestion that those words imply some power to make decrees *compelling* the Crown to issue letters patent is met at once by the fact that the Court of Chancery never possessed any such power. Then what power was meant by this language?

Orde, J.A.

1925.

FITZPATRICK
v.

THE KING.

It will serve no useful purpose to discuss here at any length this peculiar branch of the jurisdiction and powers of the Lord Chancellor and of his Court in England, in 1837, interesting as any such discussion might be made. The Lord Chancellor, as Keeper of the Great Seal, and the Master of the Rolls, as the custodian of the Records, were charged with the performance of many duties and vested with many powers practically unknown in this country. The term "letters patent," which in Canada we apply more particularly to grants of Crown lands, was in England more particularly applicable to numerous other kinds of grants, Crown grants of land really being of comparative rarity. There were not only letters patent for inventions, but letters patent for markets, fairs, theatres, ferries, titles, etc., all of which had to pass the Great Seal. The steps leading up to the Great Seal varied, but in most cases the application or petition for the grant had to go for approval through a number of offices, the recital of which vividly recalls Dickens's Circumlocution Office. See Chitty's Prerogatives of the Crown (1820), pp. 188 and 389. In the case of patents for inventions, for instance, it is only of quite recent years that the cumbersome and tedious procedure leading up to the affixing of the Great Seal to the patents was changed. For many years before and after 1837, the Court of Chancery, or the Lord Chancellor as Keeper of the Great Seal, heard and disposed of many contested applications for grants of letters patent from the Crown, not only for alleged inventions but for other things. Just how in any particular case the jurisdiction came to be exercised would require too prolonged and intricate an inquiry. This branch of the Lord Chancellor's jurisdiction is not dealt with at any great length in any text-book that I have consulted. It was really a Common Law jurisdiction vested in the Lord Chancellor, as an officer of the Crown, somewhat akin to that of issuing certain original writs which were returnable not into the Court of Chancery but into the King's Bench and the Common Pleas. See Maddock's Chancery Practice, 3rd ed. (1837), p. 22.

The Lord Chancellor's authority to direct that the Great Seal should be affixed to a grant was vested in him as an officer of state,

Orde, J.A. but the seal would not be affixed until after the petition or applica-
 1925. tion had been dealt with by the law officers of the Crown, and in
 FITZPATRICK some cases not until after the Sovereign had himself given his
 v. approval under his sign manual. When the petition reached the
 THE KING. Chancery, caveats were sometimes lodged; and, as evidence might
 be required and the parties were entitled to be heard by counsel,
 the Lord Chancellor sat in Court for the purpose. The Chancellor's
 decision or decree would then be made effective through his own
 control over the Great Seal itself. It seems also that as early as
 the reign of Edward III. certain matters of Royal Grace were com-
 mitted to the Lord Chancellor by the Sovereign: Spence's Equit-
 able Jurisdiction of the Court of Chancery (1846), p. 337. The
 varied character and methods of issuing Royal Grants may be gath-
 ered from Chitty's Prerogatives of the Crown (1920), p. 389 *et seq.*

The case of *Ex p. O'Reily* (1790), 1 Ves. Jun. 112a, fur-
 nishes a good example of the Lord Chancellor's jurisdiction in
 matters of this kind. The Italian Opera House in the Haymarket
 had been burned down, and a patent had been granted, though not
 yet sealed, for the rebuilding of the theatre in Leicester square.
 Several caveats were entered against sealing the patent, and the
 opposing parties were heard by the Lord Chancellor. The matter
 seems to have been hotly contested by counsel for various interests,
 and in the end the Lord Chancellor stated *what advice he would*
tender to the King. This case is probably a typical one, and I think
 I am safe in saying that in no case would the Lord Chancellor have
 decreed, in terms, that the Crown should be compelled to issue
 letters patent to the rightful claimant. While by virtue of his
 office he had the power of giving effect to his own decree by sealing
 the patent to the rightful claimant, he would never have presumed
 by a decree of his Court to command it to be done.

Having regard to the widely different state of society in this
 Province from that in England in 1837, it is doubtful if the juris-
 diction intended to be conferred by what is now para. 7 of sec. 26
 of the Judicature Act of 1897, could ever have had any opportunity
 for its exercise. So far as patents of invention were concerned,
 they had already been dealt with in 1826 by 7 Geo. IV. ch. 5, "An
 Act to Encourage the Progress of Useful Arts within this Pro-
 vince." But it is to be noted that the Chancellor of the newly
 established Court was to be the Governor or Lieutenant-Governor of
 the Province himself, the judicial powers being exercised by a Vice-
 Chancellor (sec. 1), and that an appeal lay from the Vice-Chan-
 cellor to the Governor and Council of the Province. The framers
 of the Act may well have thought that in some way the like power

of dealing with contested applications for letters patent as that possessed by the Lord Chancellor in England might, if occasion arose, be exercised through the new Court of Chancery in Upper Canada, whose findings or decrees as to rightful claimants would be made effective through its Chancellor, who as Governor of the Province would be the Keeper of its Great Seal.

Orde, J.A.

1925.

FITZPATRICK
v.
THE KING.

To deduce from any jurisdiction so purported to be given to the Court by this provision, a power to compel the Crown to grant letters patent, in a case where the Crown by its defence sets up its prerogative right to refuse a patent, is to give to the provision a meaning which, in my judgment, is not to be found in the language of the section itself and was never intended.

There may, perhaps, be cases where a suppliant, claiming to be entitled to the issue of a patent and obtaining a fiat, may be entitled to a decree declaratory of such a right, but that would wholly depend upon the nature of the defences raised by the Crown to the petition. And it would still rest with the Crown whether or not it would give effect to a declaratory decree by issuing or withholding the patent. Suppose that by an instrument under the Great Seal or by some official acting under a statute, an agreement to sell Crown lands is made, which, as far as it is possible under our machinery of Government to make it so, is absolutely binding upon the Crown, and because of some dispute as to its interpretation the purchaser is refused his patent, but, upon a petition of right being lodged, the Crown should grant a fiat, and then by its defence should refrain from setting up its prerogative right to refuse the grant, the Court might quite properly, while unable to decree specific performance in the strict sense, declare upon the issues raised that the suppliant had shewn himself to be entitled to a patent in accordance with the terms of the agreement. But, while the Court might so deal with such a petition upon defences so raised, it is questionable whether such an issue between the Crown and a subject comes properly within the scope of petition of right at all, having regard to what I have already said as to the limited nature of the relief to be obtained by this procedure when realty is involved. Damages for breach of the contract would strictly be all that the suppliant would be entitled to claim.

The case of *Canada Central Railway Co. v. The Queen*, 20 Gr. 273, must, I think, be regarded as of the special and unusual character to which I have just referred. Strong, V.-C. (afterwards Chief Justice of Canada), there held that petition of right was the proper proceeding for enforcing the railway company's right to the lands in question, but his judgment was, I think, largely gov-

Orde, J.A.
1925.
FITZPATRICK
v.
THE KING.

erned by the character of the special legislation which entitled the railway company, upon certain conditions, to a grant of 4,000,000 acres of the waste lands of the Crown. It must not be overlooked that the case did not involve the title to any particular parcel of land, but merely the right of the railway company to a grant of so many acres to be selected from certain lands of the Province.

At p. 292 of the report; the learned Vice-Chancellor refers to the jurisdiction conferred upon the Court of Chancery by sec. 2 of the Act of 1837 "to decree the issue of letters patent from the Crown to rightful claimants," and says that "there is no reason if the Lieutenant-Governor thinks fit to waive all objections founded on prerogative rights, by endorsing the petition, why effect should not be given to this provision, and I am unable to see how the Court now could refuse, on a petition of right, to decree the issue of a patent, provided the suppliant makes out his case upon the merits." This opinion, coming from one of the greatest equity lawyers this country has produced, is not lightly to be disregarded. But, if the learned Vice-Chancellor meant that by endorsing his fiat upon the petition the Lieutenant-Governor had waived all the prerogative rights which the Crown might raise by way of defence, I cannot, with respect, agree with him. It is the prerogative right of the Crown to refuse its fiat to any petition of right. The granting of a fiat is a mere act of grace, though as a matter of public administration it ought not to be withheld when the suppliant's petition sets out some reasonable cause of action: *Clode on Petition of Right*, p. 165. But I have never understood, and I think there is no authority for the suggestion, that by granting a fiat the Sovereign or his representative waives any prerogative right whatever other than that of withholding the fiat itself. In *Tobin v. The Queen* (1863), 14 C.B.N.S. 505, which dealt with the effect of the English Petition of Right Act of 1860 upon the Crown's prerogative right to demur and plead at the same time, it was laid down, in language wide enough to cover matters other than mere procedure, that the Crown's prerogative rights were not affected by the granting of the fiat. And the same principle must be applicable under our Consolidated Rules which have replaced the old Ontario Petition of Right Act. The case of *Clarke v. The Queen*, 1 Can. Ex. C.R. 182, already mentioned, indicates that the granting of a fiat did not waive the Crown's prerogative right to demur to the petition by raising the objection that petition of right would not lie to compel the Crown to grant a patent.

The real ground upon which the learned Vice-Chancellor disposed of the objection raised by the Attorney-General as to the

power of the Court to grant the relief claimed in the *Canada Central* case appears to have been that the Act of the Legislature under which the suppliants claimed had constituted the Crown a trustee for the suppliants, and that a trust could be enforced against the Crown. The decree made in that case was in fact merely declaratory and to the effect that the suppliants had constructed so many miles of their railway in accordance with the Act and were therefore entitled to a proportion of the grant of lands assured them by the legislation in question.

If a case like the *Canada Central* case were to arise to-day, involving the question whether or not under a special Act a railway company had earned its right to a grant of public lands, it would probably be not only the more practicable but the more proper course to sue the Attorney-General for a judgment declaratory of the company's rights.

The *Canada Central* case must, I think, be regarded as of a special character. I cannot regard it as an authority for the proposition that the Court has any power to compel the Crown to issue letters patent.

In a case, not cited upon the argument, of *Qu'Appelle Long Lake and Saskatchewan Railroad and Steamboat Co. v. The King* (1901), 7 Can. Ex. C.R. 105, where petition of right was brought to enforce a contract for the grant of part of the public domain, Burbidge, J., held that petition of right would lie, and that the petition was not open to the objection that a merely declaratory judgment was sought thereby. There is, however, no suggestion that the Court could enforce the contract specifically. In many respects the case closely resembles the *Canada Central* case.

There have been, of course, several cases in the early history of the Province where the Court has dealt with the rights *inter se* of rival claimants to Crown lands while the lands were still vested in the Crown. Many of these were either actions for trespass or of ejectment, and the right to maintain such an action by one who had the better right, even though he had no estate in the lands whatever, was upheld. See, for example, *Doe dem. Henderson v. Westover* (1852), 1 E. & A. 465; and *Doe dem. Henderson v. Seymour* (1852), 9 U.C.R. 47. And there are cases like *Bull v. Frank* (1865), 12 Gr. 80, and *Pride v. Rodger* (1896), 27 O.R. 320, where the Court pronounced declaratory judgments as to the rights of locatees of Crown lands as against others. In the latter case Boyd, C., refers to the jurisdiction "to decree the issue of letters patent from the Crown to rightful claimants," but he is careful to speak of the relief as merely declaratory, and effective only if the Crown is willing to act upon the judgment of the Court.

Orde, J.A.

1925.

FITZPATRICK

v.

THE KING.

Orde, J.A. I have enlarged at, perhaps, too great length upon this point,
1925. but the strenuous argument by counsel for the suppliant that the
Fitzpatrick Court could grant the relief prayed for under the provisions of sec.
v. 26 of the Judicature Act of 1897, and the somewhat obscure lan-
The King. guage of para. 7 of that section, rendered it expedient, in my
judgment, to make clear what to myself never seemed open to
question upon principle, that the Court never possessed the power
to compel the Crown to issue letters patent.

From this it does not follow, as already pointed out, that if the Court should find that the Crown had in fact bound itself by contract to sell a parcel of land to a subject, there might not be a declaratory judgment to that effect which would award damages for its breach. In such cases the Crown might perhaps still make the grant rather than pay the damages. Much would depend upon the way in which the issues were presented to the Court. The right to recover damages for breach of contract against the Crown, which was finally settled in *Thomas v. The Queen* (1874), L.R. 10 Q.B. 31, and is covered by the definition of relief in sec. 2 of the old Ontario Petition of Right Act of 1877, already referred to, must extend to a contract for the sale of land.

In the present case it is not open to me to review the action of the officials of the Crown Lands Department, nor ought I to comment upon the propriety or otherwise, as a matter of departmental routine or of public policy, of the decision to refuse the suppliant a patent. The suppliant's rights must be determined according to such legal and equitable principles as are applicable to the purchase of land from the Crown having regard to the terms of the statutes and regulations under which the lands are sold and to the Crown's prerogatives. If there was a binding contract on the part of the Crown to sell the suppliant the lands in question, he may be entitled to appropriate damages for its breach. If there was no binding contract, his action fails.

Was there any contract here at all, or if so did the suppliant ever comply with the conditions entitling him to a grant? There is no contract under the Great Seal. The contract, if there is one, must arise from the application for the lands and the acceptance of the deposit on account of the purchase-price, and be conditional, so far as any obligation upon the Government is concerned, upon the due performance of the necessary settlement duties.

It appears to be clear from the terms of the Public Lands Act, R.S.O. 1914, ch. 28, that where the sale of public lands is conditional upon the performance of settlement duties the question whether or not those duties have been performed rests wholly within

the determination of the Minister, whose decision by sec. 15 is final and conclusive. The present Public Lands Act contains no such provision as that in the first Public Lands Act, which was passed in 1837, 7 Wm. IV. ch. 118, sec. 3 of which expressly provides that purchasers of land after the allowance of their claims shall be entitled to have the patents issued to them.

Orde, J.A.

1925.

 FITZPATRICK
v.
THE KING.

The present Act does not say how the Minister's decision is to be expressed, and it is not easy to determine whether his decision that a purchaser or locatee has complied with all the provisions of the Act would constitute a binding contract on the part of the Crown entitling the purchaser, if refused a patent, to recover damages for a breach of contract upon a petition of right after fiat granted, or is merely a preliminary step justifying the subsequent action of the Lieutenant-Governor in Council in granting the patent. The whole Act is an enabling one, authorising the Minister to do certain things, but, except as to certain matters, not giving rights to purchasers or locatees.

In the present case, the suppliant contends that the approval given by Mr. Cochrane on the 18th December, 1906, as shewn by the initials "O.K.F.C." upon the two affidavits already mentioned, and implemented by the direction of the Deputy Minister that the patents should issue, was a decision in his favour under sec. 15, that all the terms of his contract with the Crown had been completed and that nothing further remained to be done but to issue the patents.

I do not think that, in the present circumstances, I am called upon really to decide this nice point, because there are other considerations which make it clear that the Minister's decision was necessarily given subject to the existing Water Power Regulations. There was no express reservation of any water power or any reference to the regulations in this regard during the course of the dealings between the suppliant and his predecessors in title on the one side and the Department on the other, but the suppliant himself in effect admits, by the attitude which he adopted and the course which he followed, that the same was subject to the Water Power Regulations of the 21st June, 1898.

I find it impossible to follow the argument that, because the Blanche river at the foot of Wendigo lake divides itself for a short distance into three separate streams or channels, which again unite into one a few hundred feet below, the water power is to be considered as three distinct and separate powers and not one. Mr. Walsh lays much stress upon the words "in their natural condition," which appear in the first paragraph of the regulations, and

Orde, J.A. he argues that the damming of two of the streams in order to
1925. divert the whole flow down one channel, in order to accumulate
FITZPATRICK the whole power at the one point, destroys the "natural condition"
v. of the water power. But it is quite conceivable that in the drop
THE KING. of 40 feet from the mouth of the lake to the foot of the rapids,
there may be several points below the islands where it might be
possible to make use of the whole power in its natural condition
without damming any of the separated streams above. Mr. Walsh's
argument, I think, defeats itself, because it is apparent that no
water power can be used at all without some artificial means for
turning it to account. There must be a flume and a dam of some
sort in order to concentrate the water upon the water-wheels or
turbines.

Just what is meant technically by the words "in their natural condition," I am not able to say. No evidence was offered upon that point, but I should say that if the water naturally flowing down one stream were augmented by the diversion into it of water flowing from some other source the power so developed could hardly be characterised as being produced by either stream in its natural condition. But, where a stream leaves a lake and happens to be divided by two small islands for a short distance into three separate channels, the water power of the whole stream, even so divided, must be considered as a unit rather than as three separate water powers. There is a head of water flowing from one source at its commencement and becoming a smooth stream again below. As a water power, the flow, volume, and head of water must of necessity be treated as a unit. This is the view taken by the Government engineers and adopted by the Department.

There is rather a significant thing in the evidence given by Mr. Smith upon commission tending to shew that the power must be considered as one and not as three. In his affidavit already mentioned, he gives the horse power capable of development in each of the three streams separately. When examined upon commission he said that he had made a slight mistake in his calculations, which resulted in the water power of one of the streams being given as too large and the other as too small, but the total of the three nevertheless remained the same, and he explained that this must necessarily be so. In other words, the power capable of development by the head of water leaving the lake amounted to a certain total quantity of horse power, and it was immaterial how it was distributed among the three channels. It seems to me clearly impossible to say that a water power created by a rapid several hundred feet in length is to be calculated as existing at any particular point

during the course of the rapid. It must necessarily be estimated as a whole, and the point at which it is capable of being turned to the best economic use is a matter for engineers to determine. There might in fact be several different points at which the power could be equally well developed.

Mr. Walsh also contended that where the rapid creating the power was located upon more than one half lot the power must be divided at the boundary-line and treated as two. This argument I think too absurd to require any serious consideration. The regulations are intended to preserve each water power as a whole, and if any particular water power exceeds 150 horse power then it is immaterial how many lots it may cross. It is the water power as a unit which is to be reserved, and it could never have been intended that the unit should be destroyed merely because of an artificial boundary between one lot and another.

Quite apart from the question as to the reservation of the water power, I think that the Minister was deceived by the suppliant with regard to the performance of the settlement duties. The evidence as to the clearing and cultivation of the necessary quantity of land is very unsatisfactory. There is no doubt, of course, that when the suppliant acquired the two half lots in the autumn of 1906 he proceeded to do some work in the way of clearing and cultivation. But what he did was of the most perfunctory character and for the sole purpose of laying a foundation for the application for his patents. There was no satisfactory evidence of any cultivation in the true sense whatever. Had the patents issued, I think they might afterwards have been revoked on the ground of fraud in this respect alone.

The suppliant wholly fails, for the reasons I have already given, which may be recapitulated as follows:—

(1) In concealing from the Minister the fact that he, and not his brother, was the real owner of one of the half-lots, the suppliant was evading the regulations and committing a fraud upon the Crown.

(2) The contract, if there was a contract, between the suppliant and the Crown, was always subject to the water power regulations as set forth in the order in council of the 21st June, 1898; and, as the power upon the lands in question exceeded 150 horse power, the Crown was entitled to the water power and to refuse the suppliant a patent without such reservation.

(3) The Minister's so-called approval of the suppliant's performance of his settlement duties was made without full information as to the real nature thereof; and, had the Minister been

Orde, J.A.

1925.

FITZPATRICK
v.
THE KING.

Orde, J.A. aware of the character of that performance, no approval whatever
 1925. would have been given.

FITZPATRICK v. THE KING. The suppliant, therefore, not only fails to establish any right either as a matter of law or otherwise to compel the Crown to issue patents to him for the lands in question, but also fails to establish any contract upon which to found a claim for damages for any alleged breach.

The petition must therefore be dismissed with costs payable both to the Crown and to the Wendigo Power Company Limited.

[IN CHAMBERS.]

1925.

POST V. LANGELL.

April 21.

Appeal—Judgment of Appellate Division—Plaintiff Appealing to Privy Council and Defendant to Supreme Court of Canada—Motions for Allowance of Security upon each Appeal — Supreme Court Act, R.S.C. 1906, ch. 139, sec. 75, and Rule 2—Privy Council Appeals Act, R.S.O. 1914, ch. 54—Practice—Stay of Proceedings—Application for, to Supreme Court of Canada.

When an application is made to a Judge of the Appellate Division of the Supreme Court of Ontario to allow the security upon an appeal to the Supreme Court of Canada, it is the duty of the Judge, if the security is satisfactory, to allow it without passing upon the question of the right of appeal: Supreme Court Act, R.S.C. 1906, ch. 139, sec. 75, and Rule 2 of the Supreme Court.

The Privy Council Appeals Act, R.S.O. 1914, ch. 54, confers upon the Court appealed from, upon an appeal to the Privy Council being launched, jurisdiction not merely to allow the security but to determine whether the case is one in which an appeal will lie as of right without special leave from the Privy Council.

E. W. Gillett & Co. Ltd. v. Lumsden, [1905] A.C. 601, followed.

Where each party is dissatisfied with the decision of the Appellate Division, and both desire to appeal, the one electing to appeal to the Privy Council and the other to appeal to the Supreme Court of Canada, it is the duty of the Judge of the Appellate Division to allow the security upon each of the proposed appeals, leaving to the party appealing to the Privy Council, in case the other party desires to prosecute his appeal to the Supreme Court of Canada, the privilege of applying to that Court for a stay of proceedings.

Eddy v. Eddy (1898), *Coutlée's Digest*, p. 130, and *Bank of Montreal v. Demers* (1899), 29 Can. S.C.R. 435, followed.

Montreuil v. Ontario Asphalt Block Co. Ltd. (1920), 48 O.L.R. 18, not followed.

MOTION by the plaintiff and cross-motion by the defendant to allow the security upon an appeal on the part of the plaintiff to the Privy Council and to allow the security upon an appeal on the part

of the defendant to the Supreme Court of Canada from the judgment of the Appellate Division, 28 O.W.N. 54.

The respective bonds were, for practical purposes, filed contemporaneously, the bond filed on behalf of the defendant on his appeal to the Supreme Court being filed a little earlier than the other.

April 20. The motion and cross-motion were heard by MIDDLETON, J.A., in Chambers.

Shirley Denison, K.C., and *H. M. Cody*, for the plaintiff.

G. M. Huycke, for the defendant.

April 21. MIDDLETON, J.A.:—It is argued that I should follow the decision of my brother Sutherland in *Montreuil v. Ontario Asphalt Block Co. Ltd.* (1920), 48 O.L.R. 18, and allow the security upon the appeal to the Supreme Court and disallow the bond filed on the appeal to the Privy Council, upon the theory that it was the appellant to the Supreme Court who “took the first effective step toward prosecuting an appeal.” If this case stood alone, it would be my duty to follow it, but the matter is, I think, governed by decisions of the Supreme Court of Canada itself and by the express terms of the statute, and in the result I think I must determine the case in accordance with my own view based upon the superior authorities.

Under the terms of the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 75, it is my duty, upon security being given to my satisfaction, to allow that security as an essential piece of the procedure necessary for the bringing of the appeal. Had the motion been made to a Judge of the Supreme Court of Canada, then the question of the competency of an appeal would arise for determination: see Rule 2 of the Supreme Court. This gives jurisdiction to pass upon the question of the right to appeal only to a Judge of the Supreme Court of Canada, and confers no jurisdiction when the motion is made in the Court below.

The Privy Council Appeals Act, R.S.O. 1914, ch. 54, confers upon the Court appealed from jurisdiction not merely to allow the security but to determine whether the case is one in which an appeal will lie as of right without special permission from the Privy Council: *E. W. Gillett & Co. Ltd. v. Lumsden*, [1905] A.C. 601.

Where each party is dissatisfied with the decision of the Court below and both desire to appeal, the one electing to appeal to the Privy Council and the other to appeal to the Supreme Court of

1925.

POST

v.

LANGELL.

Middleton,
J.A.
 1925.
POST
v.
 L'ANGELL.

Canada, if the matter stood quite apart from authority and I had discretion to deal with it, I should hold that the appeal which should be allowed to proceed is the appeal to the more august tribunal. Where the appeal and cross-appeal both relate to the determination of the case and do not deal with entirely separate and distinct matters, it appears to me more seemly that the appeal should proceed only to the superior tribunal, where the matter in controversy can be decided with unquestionable finality. An appeal to the Supreme Court of Canada, although in one sense final, is not necessarily so, as the Privy Council may, of course, grant leave to carry the case to that body, and the more convenient course would be, it seems to me, to allow the appeal direct to that body, where the appellant has, under the statutes of the Province, the right to proceed without any application for leave, and I cannot see how I have any authority or right to deprive the plaintiff of that appeal which is given him by the statute.

Fortunately the matter is now, I think, removed beyond the region of doubt by two decisions of the Supreme Court of Canada. In the first case, *Eddy v. Eddy* (1898), Coutlée's Digest, p. 130 (see Cameron's Supreme Court Practice, 3rd ed., p. 228), the Supreme Court refused to entertain an appeal to that Court, and directed it to be stayed until an appeal of the respondent in the Supreme Court to the Privy Council had been disposed of. In the later case, *Bank of Montreal v. Demers* (1899), 29 Can. S.C.R. 435, the Supreme Court seems to have regarded the attempt to prosecute an appeal to it pending an appeal of the opposite party to the Privy Council as contumacious and directed the proceedings to be stayed, ordering the appellant to pay the costs.

From this I conclude that it is my duty to allow the security upon each of these proposed appeals, leaving to the plaintiff, in case the defendant desires further to prosecute his appeal to the Supreme Court, the privilege of applying to the Supreme Court for a stay of proceedings. I am encouraged to believe that this is the right course for me to adopt, because in *Bank of Montreal v. Demers* a Judge of the Court below had permitted the appeal to proceed, and a motion was made to quash the order of the Judge in the Court below, and this was dismissed with costs upon the ground that the Court below had jurisdiction to make the order. This I take to be a decision that a Judge in the Court below not only had the jurisdiction but had the duty to make the order allowing the security, leaving it to the Supreme Court to determine whether the appeal should be allowed to proceed.

I therefore make the order allowing the security upon the

appeal to the Privy Council and allowing the appeal, the order to be in the form indicated by the Privy Council in the *Gillett* case, *supra*.

If the party desiring to appeal to the Supreme Court of Canada so desires, I also make an order allowing the security upon his appeal to that Court, without prejudice to the right of the respondent in that appeal to move to stay it, following the course indicated in the cases referred to. The costs of these motions may well be treated as costs in the appeal to the Privy Council if an order is not taken out allowing the bond on the appeal to the Supreme Court. If such an order is issued, then the costs of the motion to allow the security upon the appeal to the Supreme Court will be costs in that appeal, and the costs upon the motion to allow the bond to the Privy Council will be costs in that appeal.

No objection was taken before me to the form of the bonds, and I am proceeding on the assumption that they are satisfactory in form and substance.

Middleton,
J.A.
1925.
POST
v.
LANGELL.

[ROSE, J.]

IMPERIAL BANK OF CANADA V. DENNIS.

1925.

April 24.

Company—Promissory Notes Made by Subscribers for Shares—Transfer and Endorsement by Company to Bank as Security for Loan—Validity of Endorsement—Signatures of Secretary-Treasurer and Managing Director—Ostensible Authority—Holder in Due Course—Bills of Exchange Act, secs. 2(d), (8), 21(3), 31, 56, 60, 74—Negotiation of Notes—Claims by Makers against Company and Officers Brought in as Third Parties—Promises—Misrepresentations—Authority—Absence of Consideration—Allotment of Shares—Instrument Signed in Blank—Authority to Fill up—Judgment against Makers—Right of Indemnity (except in Case of Maker-director) against Company and Managing Director.

Promissory notes made by the defendants respectively, payable to the order of an incorporated trading company, were offered to the plaintiff bank as collateral security for a loan applied for by H. as managing director of the company. The notes bore what purported to be the endorsement of the company, signed by C. as secretary treasurer and countersigned by H. as managing director. The endorsement was in blank. The bank-manager agreed to make the loan. He took from H. a document called "a general pledge of collaterals," signed in the name of the company by the president and by C. as secretary; he also caused H. to add to each note his personal endorsement and, in the case of one defendant, H.'s guarantee of payment; he took the company's note for the amount of the loan and had the amount placed to the credit of the company in its account with the bank; the amount was then paid out to H. upon the cheque of the company, and

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

H. then paid it to the bank on account of the price of a property which the company was buying. Each note was complete and regular on its face, none was overdue, and each was taken in good faith and for value and without notice of any defect in the title of the company. In an action against the defendants as makers of the notes, it was contended that the endorsements of the notes were ineffective:—

Held, that, though no formal appointment of H. as managing director had been made by by-law or resolution of the directors, he was acting as managing director with the knowledge and consent of all the directors; and, as between the company and the bank, which dealt with him in the belief that his appointment was regular, his right to perform the duties of managing director could not be questioned.

- (2) Although there was no formal authorisation of C. as secretary-treasurer to sign and of H. as managing director to countersign the endorsements, H. was acting well within the ostensible powers of a managing director in signing along with C. the company's name as endorser of promissory notes upon which the company was securing an advance; and, in the absence of any by-law saying that, while he and the secretary-treasurer might sign cheques, drafts, and orders for the payment of money, they must not endorse promissory notes, his real authority must be taken to be co-extensive with his ostensible authority.
- (3) Although there was no evidence that the directors as a body authorised the particular transaction, the bank had no reason to suppose that the officers were acting without the authority of the board; the money went to the credit of the company; as between the bank and the company there was a negotiation of the notes; and the bank became the holder (Bills of Exchange Act, sec. 60), its position being sound as against the makers as well as against the payees.
- (4) The bank, then, being a holder of the notes, was a holder in due course (Bills of Exchange Act, sec. 56); and (sec. 74) was entitled to payment, even if some defence was open to the makers as against the company.
- (5) In the circumstances (set out below) any claim against the company based upon C.'s promise, which he had no authority to make, that the note should not be used forthwith, failed.
- (6) Upon the evidence, no claim of any of the defendants against the company based upon misrepresentations made to them by C. or H. could succeed.
- (7) The claim of the defendant D. against the company that no consideration was given for his note, in that there was no acceptance of his application for shares by the allotment of shares or otherwise, failed because he was a director, or was acting as a director, and had full knowledge of the practice which the company was following in reference to the issue of shares—viz., that, when an applicant had paid the amount of his subscription, the transfer agents were directed to issue a certificate, without any formal allotment by the directors.
- (8) The other defendants were not directors and were not aware that the company was following any other than the usual procedure. Their applications were in the form of offers, and without the acceptance of those offers there were no contracts between them and the company. It was open to them, instead of compelling an allotment, to revoke their offers, and the company did a wrong to them by negotiating the notes. The liability of the defendants to the bank was the direct consequence of that wrongful act, and against that consequence the company must indemnify them—the defendants having

brought the company into the action by regular third party procedure.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

- (9) C. had no authority from the company to make an agreement that subscribers for shares should have, in addition to those shares, shares in the stock of another proposed company.
- (10) The claim of the defendant Y. based on the allegation that he had a private understanding with C. that he (Y.) should not be liable on his note at all, was clearly invalid.
- (11) One of the notes signed by the defendant W. was said by him to have been signed in blank and to have been filled up by C. for \$1,000 without proper authority; but the name of the payee was on the paper when it was given to C., and C. had authority, in some circumstances and without further instructions, to complete the note, if it was incomplete; the amount had been settled upon even if it was not filled in before the paper left W.'s hands; and, therefore, the bank, as a holder in due course, was entitled to enforce payment. Any one in possession of the note had *prima facie* authority to fill up the blank for the place of payment (Bills of Exchange Act, sec. 31). If the instrument was incomplete when handed to C., and C.'s authority to complete and deliver it to the payee was limited or conditional and had been exceeded or abused, W.'s defence to the bank's claim would not be established.

Ray v. Willson (1911), 45 Can. S.C.R. 401, 421, referred to.

But there was no proof that W. subscribed for shares which were to be paid for by this note, and there was a real absence of consideration.

- (12) Although H. did not authorise C. to make any misrepresentation or promise, and made none himself, he was under the same liability as the company, and whatever rights the defendants had against the company they had against H. also.

THIS action and three other actions were brought by the same plaintiff, a chartered bank, against different defendants—Dennis, Wenige, Wilson, and Yull—as the makers of promissory notes, each payable to the order of Bancroft Marbles Limited, and by that company endorsed over to the bank; and in each action the defendant therein brought in Bancroft Marbles Limited, J. R. Hoidge, and Donald Cameron as third parties.

The four actions and the third party issues were tried together by ROSE, J., without a jury, at London.

J. C. Elliott, K.C., and *J. G. Gillanders*, for the plaintiff bank.

J. W. G. Winnett and *H. B. Neely*, for the defendants.

J. R. Cartwright, for Bancroft Marbles Limited and Hoidge, third parties.

April 24. ROSE, J.:—These four cases were tried together. In each the Imperial Bank sues the defendant as the maker of a promissory note (or, in Wilson's case, of three promissory notes), made by the defendant, payable to the order of Bancroft Marbles Limited, and by Bancroft Marbles Limited endorsed over to the bank; and in each case the defendant brings in Bancroft Marbles Limited, J. R. Hoidge, and Donald Cameron as third parties.

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

A company known as Ontario Marbles Limited, in which the third party Hoidge was largely interested, went into liquidation in or about the year 1918, owing a considerable sum to the bank. In July, 1918, the liquidator and the trustee for the holders of the bonds of that company gave to Hoidge an option (exhibit 5) to purchase all the company's property for some \$84,000, which option it was agreed might be exercised by paying \$10,000 to the bank within a limited time. In July, 1921, Bancroft Marbles Limited was incorporated by letters patent issued under the Ontario Companies Act (exhibit 54), and on the 21st July, 1921, an agreement was made between Hoidge and Bancroft Marbles Limited (exhibit 9) by which Hoidge agreed to sell and Bancroft Marbles agreed to purchase all the property of Ontario Marbles, and any real or personal property in the vicinity of Bancroft which might be standing in Hoidge's name (the intention being to include any property which Hoidge had acquired for Ontario Marbles but had not transferred). The price to be paid to Hoidge was \$85,000 (and in a certain event an additional amount) and certain shares of the capital stock of Bancroft Marbles; and Hoidge agreed that he would give some shares of common stock to persons who might subscribe for shares of a proposed issue of preferred stock. The cash which Bancroft Marbles was to pay to Hoidge was a few dollars more than the price named in the option which had been given to Hoidge by the liquidator and the trustee for the holders of the bonds of Ontario Marbles Limited; and, although the time limited by the document (exhibit 5) had expired, there is no doubt that, if Bancroft Marbles Limited had paid Hoidge, Hoidge could have made title to the properties, for it was well understood between him and the bank that the property would be conveyed upon payment of the price named in the document, and the bank, as holder of the bonds of Ontario Marbles Limited, was in control of the situation and could have made title, even without the consent of the liquidator. The price named was less than the amount of the bank's claim against Ontario Marbles Limited. By a letter (exhibit 6) dated the 30th October, 1922, written with the concurrence of the liquidator, the bank gave assurance to Hoidge that, so far as the bank and the liquidator were concerned, the sale would be made at the price stated; but this letter was written after the making of the notes sued upon in these actions, and it is valuable only in that it confirms—if any confirmation is needed—the evidence of Mr. LeMesurier, the manager of the bank's Toronto office, that Hoidge's agreement with Bancroft Marbles was an agreement which Hoidge could have performed if Bancroft Marbles had performed

its part. The importance of the question as to Hoidge's ability to make title will appear in the discussion of the claim of the defendants against the third parties.

Donald Cameron was authorised by Bancroft Marbles Limited to solicit subscriptions for shares of the company's preferred stock. In July, 1922, he procured subscriptions from each of the defendants (exhibits 15, 41, 47, and 56) and took from them respectively their promissory notes payable to the order of the company. There are questions, which will have to be mentioned in the discussion of the issues raised by the third party notices, as to the state in which these notes were at the time of their delivery to Cameron; but for the purposes of the issues between the bank and the defendants it suffices to say that the papers were intended to be promissory notes, that any filling in of blanks which may have been done by Cameron after the signatures were affixed was done strictly in accordance with Cameron's authority, and that when the notes reached the bank each was complete and regular on its face. The issues raised include issues as to the effect of a promise alleged to have been given by Cameron that the notes would not be used until certain things had happened, and as to the effect of certain misrepresentations alleged to have been made by Cameron and perhaps by Hoidge; and, as between the makers and the bank, the issue whether the bank is a holder in due course and as such is entitled to be paid, even if Bancroft Marbles Limited could not have succeeded in an action on the notes.

Hoidge, as managing director of Bancroft Marbles Limited, applied to the bank for a loan of \$10,000 and offered the notes sued upon and similar notes of other persons as collateral security. The notes were handed to Mr. LeMesurier, bearing what purported to be the endorsement of Bancroft Marbles Limited made by Cameron as secretary-treasurer and countersigned by Hoidge as managing director. Each was, as has been stated, complete and regular on its face at this time, and none of them was overdue. Mr. LeMesurier believed that the notes had been given for shares; but he knew nothing further about the relations between the makers and the company, and he knew nothing at all about any promises or representations made by Cameron. He caused inquiries to be made as to the financial standing of the various makers, and, having satisfied himself that the notes were ample security, he agreed to make the loan. He took then a document called a "general pledge of collaterals," signed in the name of the company by Walter Page as president and Cameron as secretary (exhibit 12); and, having had Hoidge add to each note his personal endorsement,

Rose, J.
1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Rose, J.
1925.
—
IMPERIAL
BANK OF
CANADA
v.
DENNIS.

and, in the case of Dennis's note (exhibit 1), his guarantee of payment—if the time when Hoidge's guarantee was taken was stated at the trial, it has escaped my memory, and it is unimportant—he took a note from the company for \$10,000 (exhibit 3), and had the amount placed to the credit of the company in its account with the bank. Then the company's cheque in favour of Hoidge, signed by Cameron and countersigned by Page, was presented and paid, and Hoidge paid the amount to the bank on account of the purchase of the assets of Ontario Marbles Limited, on the terms stated in the letter of the 30th October, 1922 (exhibit 6), already referred to.

As has been stated already, it is quite clear upon the evidence that each note was complete and regular on its face when it was handed to Mr. LeMesurier. It is equally clear that each was taken in good faith and for value and without notice of any defect in the title of Bancroft Marbles Limited. The bank, then, if it is a holder of the notes, is a holder in due course—sec. 56 of the Bills of Exchange Act—and, under sec. 74 of the Act, is entitled to payment even if there is some defence open to the makers as against Bancroft Marbles Limited; and, in my opinion, there is no possible question as between the bank and the defendants except the question, raised at the trial and now to be discussed, whether the bank ever became a holder.

The endorsement of the notes was in blank. Therefore, if it was a valid endorsement, the notes became payable to bearer—the Bills of Exchange Act, sec. 21(3)—and the bank became the holder—sec. 2 (*d*) and (*g*). The question then is whether the endorsement was valid; for the "pledge of collaterals," assuming it to be regular, and the bank's right under sec. 61 of the Act to call for an endorsement, are of no importance: the transfer without endorsement confers upon the transferee only such rights as the transferor had, and an endorsement now, after the maturity of the notes and after notice to the bank of such defences as may be available against Bancroft Marbles Limited, will not put the bank in the position of a holder in due course: *Whistler v. Forster* (1863), 14 C.B.N.S. 248.

It is contended that the endorsements were ineffective, (1) because Hoidge had not been appointed managing director, (2) because the by-laws of the company do not name the secretary-treasurer and the managing director as the persons to endorse, and (3) because the directors had not authorised Hoidge to apply to the bank for a loan upon the security of the notes; but the contention does not seem to me to be well founded.

No formal appointment of Hoidge as managing director had been made by by-law or resolution of the directors, but he was acting as managing director with the knowledge and consent of all the directors, evidenced, *inter alia*, by their signatures to the prospectus (exhibit 40) in which he is stated to hold the office; and as between the company and the bank, which dealt with him in the belief that his appointment to the position which he was filling was regular, his right to perform the duties of the managing director cannot be questioned. The first point, then, presents no difficulty.

The second point is that, while by-law number 19, as amended on the 4th January, 1922, enacts that all cheques, drafts, or orders for the payment of money shall be signed by the secretary-treasurer and countersigned by the president, a vice-president, or managing director, no by-law names the persons who are to endorse negotiable instruments on behalf of the company; so that there is not to be found any formal authorisation of Cameron as secretary-treasurer to sign and of Hoidge as managing director to countersign the endorsements upon which the bank's position as a holder depends. But Hoidge was the man with whom the bank had dealt as the company's representative; he produced the general pledge of collaterals signed by the president and secretary-treasurer, who were the officers named in by-law number 16 as the officers who are to sign such documents as may be requisite in the case of any borrowing from a bank "by hypothecation or by pledge under section 88 and other sections of the Bank Act;" he was acting well within the ostensible powers of a managing director in signing, along with the secretary-treasurer the company's name as endorser of promissory notes upon which the company was securing an advance; in the absence of any by-law saying that, while he and the secretary-treasurer might sign cheques, drafts, and orders for the payment of money, they must not endorse promissory notes, his real authority must be taken to have been co-extensive with his ostensible authority. There seems to me to be nothing in this second point.

The third point—the lack of formal authority from the directors to Hoidge to apply to the bank for a loan—seems to be unimportant in view of the fact that the loan was made to the company, the money being placed to the company's credit and paid out, for the company's purposes, upon a cheque signed in the name of the company by the secretary-treasurer and countersigned by the president. It is true that the company's by-laws numbers 15 and 16, which are the only by-laws dealing with the borrowing of money, contemplate action by the directors, and that there is no evidence

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

that the directors as a body authorised the particular transaction; but the bank had no reason to suppose that the officers with whom it was dealing were acting without the authority of the board; the money, as has been mentioned, went to the credit of the company; as between the bank and the company there was a negotiation of the notes, and the bank became the holder—Bills of Exchange Act, sec. 60—and its position is sound, although no formal evidence of action by the board was produced; and, if the position is sound as against the payees, it must be sound as against the makers also, unless it can be said that the reason for finding that, as between the payees and the bank, there was a negotiation is merely that the payees are estopped from denying the negotiation, whereas there was no negotiation in fact and the makers are not estopped.

If the bank had sued the company as endorser it might have been said that, whether there was or was not an actual negotiation, the company, having got the money, was estopped from denying the endorsement and delivery; but in my opinion it would have been correct to go farther and to say that there had been actual negotiation and that the case was not one of estoppel; and I think that the same thing is to be said here. In my opinion, the true finding upon the evidence is that Hoidge by tacit consent had the powers which are naturally incident to the office which he filled, that among such powers was the power to borrow money in advance of the maturity of the notes for the purpose of making a payment on account of the purchase-price of the property which it had been agreed should be acquired for the company, and that his act was binding upon the company as an exercise of the authority conferred upon him.

For these reasons, I am of opinion that the bank became the holder of the notes, and, if a holder, a holder in due course, and that it is entitled to judgment against the makers, even if the makers have a good defence as against the company.

The chief claim of the defendants against Bancroft Marbles Limited, or the claim to which the greater part of the evidence was directed, is based upon what occurred at a meeting held in London just before the notes were signed. It is said—and, Cameron not having been at the trial and there being no contradiction of the evidence, it must be taken as proved—that at the meeting Cameron said that a sum of about \$30,000—the witnesses differ somewhat about the amount—was required for a certain specified purpose and that if the persons whom he was addressing would subscribe for shares and would give their notes for the amounts of their respective subscriptions the notes would not be used until the whole sum had been subscribed, and that when the money was raised it

would be devoted to the purpose mentioned, which had to do with the acquisition and development of certain water powers and not with the purchase of the assets which Hoidge had agreed to convey; and it must be found that the notes (except one of the three signed by Wilson, which will be mentioned separately) were given on the faith of this promise, and that the total sum talked of was not subscribed before the notes were transferred to the bank, if it has been subscribed at all. Cameron, however, had no authority from the company to make any agreement that the notes would not be used forthwith; the fact that he had purported to make it was not communicated to any one; and each of the defendants signed an application for shares, in which, after stating that he had received a copy of the prospectus, he agreed that no representation, condition, understanding, or agreement, other than those contained in the application, should be binding upon the company or upon himself (exhibits 15, 41, 47, and 56)—this statement does not apply to Wilson's note just mentioned. There is some doubt as to whether some of the notes were complete when they were handed to Cameron, but nothing turns upon this, for, admittedly (except in the case of the one Wilson note), Cameron had authority to complete them if they were incomplete, and admittedly any filling in that he did was done within a reasonable time and the amount filled in was no greater than he was authorised to fill in. In these circumstances any claim against the company based upon Cameron's promise that the notes should not be used forthwith must fail.

The actions came down to trial without pleadings, and the affidavits of merits are indistinct as to the grounds, other than that just mentioned, upon which the defendants claim relief against the company; but at the trial there was an attempt on the part of each defendant to make out a claim based upon misrepresentation, and it will be well to discuss each defendant's case as to that claim by itself.

Dennis: It is clear that this defendant did not rely upon any representation made by Cameron or by Hoidge; he does not say that he did; he was a director and had made inquiries on his own behalf, and knew a good deal about the properties which the company proposed to acquire—and the misrepresentations discussed are misrepresentations as to the company's title: moreover, he had a copy of the prospectus which made it clear that the company did not own, but had only Hoidge's agreement to convey, the assets of Ontario Marbles Limited in liquidation, and it is not established that there was anything untrue in what was said about the right to acquire the water powers about which Cameron spoke. No claim by this defendant based upon misrepresentation can succeed.

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Wenige: This defendant is in practically the same position as Dennis in regard to misrepresentations. He had read the prospectus with care; and, while he says that Cameron said that the company owned the quarries, he does not pledge his oath that this statement was an inducement to him to subscribe, or that, with his knowledge of the contents of the prospectus, he was misled. He could not have been misled.

Yull: This defendant makes it perfectly plain that Hoidge made no representations; and, while he says that Cameron told him, at the time when he signed his application for shares, that the company owned the quarries, it is quite certain that he had such knowledge of the company's affairs as made it impossible that he should be misled by any such statement.

Wilson: This defendant went with Dennis to see the property in May, 1922, some two months before the meeting addressed by Cameron in London. He says that there Hoidge stated that the company owned 600 acres, including the quarries, mills, etc., subject only to a mortgage to the bank. I do not remember that Hoidge in the witness-box was asked anything about this statement, and I assume that he did say something which Wilson took to mean what he says was stated, and, there being no evidence that Wilson had read the prospectus, I take it that it ought to be found that when Wilson subscribed he believed that the company had an equity of redemption in the quarries rather than a right to acquire them upon making a payment. However, I do not think that the difference between the fact and what Wilson took to be the fact was material. He does not say that there was any misrepresentation as to the amount that the company would have to pay to acquire a clear title, and with a company in the process of organisation there does not seem to be any great practical difference between the right to have a conveyance upon the payment of a certain sum of money and the nominal ownership of the property subject to a mortgage for the same sum. In my opinion it cannot be found that this defendant was induced to subscribe by any misrepresentation of a material fact. He speaks also of what was said about options which had been or were to be taken on water powers and other properties, but it is not shewn that anything said about these options was untrue.

The next claim against the company is that no consideration was given for the notes, in that there was no acceptance of the applications by the allotment of shares or otherwise. In Dennis's case this claim, in my opinion, fails for the reason that Dennis was a director—or, whether his appointment on the 4th January, 1922, was or was not regular, was acting as a director—and had full

knowledge of the practice which the company was following in reference to the issue of shares. That practice, like the company's practice generally, was very loose. At a meeting of the directors held on the 3rd January, 1922, it was resolved that the company's books of stock certificates be delivered to the company's transfer agents, and that the agents be instructed from time to time, on the order of the secretary countersigned by Hoidge, to issue to such persons as the order should direct so many of the 4,500 shares of preferred stock which were then being "offered for sale to the public" as the order should direct. The practice thereafter was for Cameron and Hoidge, when an applicant for preferred shares had paid the amount of his subscription, to direct the transfer agents to issue a certificate, and this was done without any formal allotment by the directors. Dennis, being aware of this practice, did not expect any allotment to be made; he knew that if he wanted a certificate he could have it on payment of the amount of his note, which was payable six months after date; and it is difficult to see how he can be heard to say that his subscription for shares was a mere offer (although that is its form) which was not to bind him until it was accepted by the company. In reality it was an acceptance by him of an offer made by the company.

What has been said as to Dennis does not apply to the other defendants. They were not directors, and, so far as appears, they were not aware that the company was following anything other than the usual procedure. Their applications were in the form of offers—requests to the company to allot shares and cause them to be issued—and without the acceptance of those offers there were no contracts between them and the company, and the company had no right, as against them, to transfer their notes to the bank and make them liable to the bank. I take it that after having negotiated the notes the company could not successfully have denied that it had accepted the offers, and that if any defendant had paid the bank the company would have been bound to allot the shares for which he had subscribed and to issue a certificate. Therefore I think it cannot be said that there has been a failure of consideration. The defendants are in a position to insist that the company shall allot the shares for which they subscribed and shall issue certificates when the notes have been paid, and in that sense there is consideration. But, although the company by negotiating the notes bound itself to allot, the position of the defendants after the transfer of the notes was that of persons who, at their option, might insist upon allotment, and not that of persons whose offers had been accepted, and who, being bound to take the shares, were bound to pay the notes. It was still open to them, instead of compelling an allotment, to revoke their offers, and the company

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Rose, J.
1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

did a wrong to them by negotiating the notes. The liability of the defendants to the bank is the direct consequence of that wrongful act of the company, and against that consequence the company must indemnify them. No question is raised as to the regularity of the third party procedure or as to the granting in this action of whatever relief the defendants may be entitled to as against the company, and the defendants other than Dennis will have judgment against the company for the amount of their liability to the bank. The bank's claim against the company is somewhat less than the total of the bank's claim against all the defendants, but in each case the bank will have judgment for the full amount due in respect of the note, and the defendant will have judgment for the same amount against the company.

The defendants, or some of them, allege that in addition to what has just been discussed there was a failure of consideration in that it was agreed by Cameron that subscribers for shares should have not only the shares for which they subscribed but also shares of the stock of a company for supplying light and power which Bancroft Marbles Limited or its directors proposed to incorporate. On the 4th May, 1923, the directors of the Bancroft company had resolved that "any distribution of common stock or bonds of the proposed company" should enure to the benefit of stockholders (of the Bancroft company) "as certified on the books of the company as at the 1st May, 1922;" but the defendants did not subscribe until July, 1922; Cameron had no authority from the company to make the agreement alleged; the defendants, in their signed subscriptions, agreed that no condition, understanding, or agreement not contained in the written application should be binding on the company; and this promise, if it was made, is unenforceable.

The defendant Yull says that he had a private understanding with Cameron that he should not be liable on his note at all—that the note was given only so that it might be shewn to prospective subscribers as evidence that he had subscribed, whereas the fact was that the company was to give him credit on his subscription for the amount of a claim that he had against the company for advertising and was to issue the shares to him as fully paid. He does not really prove that he had a valid claim for advertising; but, apart altogether from that fact, any claim based on the alleged agreement is clearly invalid and need not be discussed.

The defendant Wilson signed three notes, two of them dated the 5th August, 1922, for \$400 each, and the third, dated the 15th August, for \$1,000. His subscription, dated the 7th July, 1922, is for 10 shares (\$1,000), and states that there is "enclosed" with it a cheque for \$200. His statement is that he was acting with Cam-

eron in forming a group of subscribers residing in or near London; that he subscribed for the 10 shares and gave Cameron on account \$200, which Cameron needed to pay his expenses of a visit to New York, and, for the balance of the amount of the subscription, he signed the two notes for \$400 each; that the note for \$1,000 was not really given for shares of the Bancroft company as such; but that, being desirous of having some of the shares of the stock of the light and power company, and Cameron promising to try to get some of them for him, he gave this note to Cameron to be shewn to the directors of the Bancroft company as evidence of his willingness to take shares of the Bancroft company's stock in case he was given with them a sufficient interest in the light and power company; that Cameron was to let him know the decision of the directors, and after he had that information he was to decide whether he would take the shares and if he decided to take them was to give Cameron instructions to fill in the note which he had signed in blank.

This evidence as to the note for \$1,000 is not convincing. It varies from the affidavit of merits, in which no distinction is made between the note for \$1,000 and the two notes for \$400 each, all being said to have been given for shares of the stock of Bancroft Marbles Limited, on condition that they were not to be discounted or negotiated until the money required for the purpose already mentioned had been raised. That variation is not very important in itself, for the affidavits are uniform in all the cases, and Wilson says that he simply signed and swore to what the solicitors put before him—as some clients who ought to be more careful in pledging their oath are prone to do—but, considered with the other circumstances, it has some weight. Another circumstance is that, while the witness says that the notes for \$400 were completed at the time of signature and that on the other paper there was nothing but the signature, the fact is that the parts that are written in purple ink in Dennis's note and in Wilson's notes for \$400 are written in the same ink in the note for \$1,000, and that in all the notes in suit the name of the payees and the signature (except, possibly, Dennis's) are in a peculiar green ink. If Cameron filled in some of the notes at the time when they were given, and if the paper which appears now to be a note for \$1,000 was perfectly blank, except for the signature, when he took it away, it is strange that he should have gone to the trouble, when filling it in, of procuring the same purple and green inks which he had used before and of using the one for filling in certain of the blanks and the other for the remainder. Apart from these difficulties, the story does not seem to be probable. Wilson and Cameron were in frequent communication. If Cameron was not to fill in any blanks that there may have been

Rose, J.

1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Rose, J.
1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

and to use the paper as a promissory note without further instructions, why give it to him? It would have been just as easy to wait until the time came for giving the instructions, and then to sign a complete note; and in the meantime a letter signed by Wilson telling what he was prepared to do would have been at least as useful for shewing to the directors as a blank piece of paper which (as would have had to be disclosed to the directors if the story is true) Cameron could not complete or deliver without further instructions.

When a person signs a paper in the form of an incomplete promissory note and gives it to another and it comes in a complete state into the hands of an innocent third party, it is not lightly to be found as against that third party that there was no delivery of the paper with the intention that it should be a promissory note. Of course there are cases where the fact has been proved—where the person to whom the paper was handed by the signer has been found to be a mere custodian without authority to fill in the blanks or to make delivery. *Ray v. Willson* (1911), 24 O.L.R. 122, 45 Can. S.C.R. 401, is one, although perhaps it is not a very good example, since in that case some of the Judges had grave suspicion as to the good faith of the holders; and there is *Hubbert v. Home Bank of Canada* (1910), 20 O.L.R. 651, so strongly relied upon by counsel for the defendant Wilson, in which the paper was never to become a promissory note, but was to be used merely as evidence of a promise to pay a premium if the signer's application for insurance was accepted—this fact was found by the trial Judge (pp. 652, 656), and his finding was accepted by the majority in the Divisional Court, and the remark of Maclaren, J.A., as to what will bring a case within the decision in *Smith v. Prosser*, [1907] 2 K. B. 735, was not the judgment of the Court. *Hubbert v. Home Bank of Canada* serves to shew that some persons have done things very like what Wilson says he did in this instance; but, even if some persons have acted in that way, there ought to be pretty clear evidence before it is found that any given individual has done so, and in this case I am not prepared to make the finding. I think it is much safer to find that the name of the payee was on the paper when it was given to Cameron; that Cameron had authority, in some circumstances and without further instructions, to complete the note, if it was incomplete—and I am by no means sure that it was lacking in any particular except the place of payment—and to deliver it as a promissory note; that the amount had been settled upon even if it was not filled in before the paper left the defendant's hands—it is admitted that it was understood that the amount might be as much as \$1,000—and, therefore, as indicated in my

discussion of the cases generally, that the bank as a holder in due course is entitled to enforce payment by the maker. The blank for the place of payment seems not to have been filled up by Cameron, but the evidence indicates that it was filled in before the paper came to the bank, and it is a blank which any one in possession of the note—e.g., the company after delivery had been made by Cameron—had a *prima facie* authority to fill up: the Bills of Exchange Act, sec. 31. If it could be found in Wilson's favour that the instrument was incomplete when it was handed to Cameron, and that Cameron's authority to complete and deliver it to the payees was a limited or conditional authority, and had been exceeded or abused—and, in my opinion, that is quite the strongest finding that could be made—Wilson's defence to the bank's claim would not be established: see the judgment of Duff, J., in *Ray v. Willson*, 45 Can. S.C.R. at p. 418. In order that Wilson may succeed as against the bank it must be found that Cameron, like the custodian in *Ray v. Willson*, did not merely abuse or exceed his authority, but acted without authority: see the judgment of Anglin, J., at p. 421. As against Bancroft Marbles Limited, however, the claim in respect of this note is stronger even than that in respect of the two notes for \$400, because there is not even proof that Wilson subscribed for shares which were to be paid for by this note, and there is a real absence of consideration.

As regards the claim of the defendants against Hoidge, I accept Hoidge's evidence. He did not authorise Cameron to make any misrepresentation of facts or any promise that the notes would not be used until certain things had happened, and he did not know what Cameron had said or agreed. He, certainly, did not make any statement that was wilfully false, and if something that he said at Bancroft about the company's title to the property formerly owned by Ontario Marbles Limited was not literally true, the untruth was immaterial, and it was not because of it that the defendants or any of them subscribed for shares. Nevertheless, I think Hoidge is under the same liability as Bancroft Marbles Limited. He knew that no allotments had been made, and he ought to have known that until the subscriptions had been accepted the defendants other than Dennis could not be liable to the company on the notes and that the company had no right to transfer the notes to the bank. He it was who did the act which renders the company liable, and the fact that he was acting for the company and not for himself makes no difference as between him and the makers of the notes: whatever rights the makers have against the company they have against him also.

In each case there will be judgment in favour of the bank against the defendant for the amount claimed with interest and

Rose, J.
1925.

IMPERIAL
BANK OF
CANADA
v.
DENNIS.

Rose, J.
 1925.
 IMPERIAL
 BANK OF
 CANADA
 v.
 DENNIS.

costs; and in each case except Dennis's there will be judgment in favour of the defendant against the third parties Bancroft Marbles Limited and Hoidge for the amount, including costs, for which the bank has judgment against the defendant, together with the costs of the third party proceedings. In Dennis's case the claim against the third parties Bancroft Marbles Limited and Hoidge will be dismissed with costs.

The third party notice was not served on Cameron, or, if it was, no proof of service was put in at the trial, and, as I understand, it is not suggested that any judgment can be pronounced as against him. If there is any misapprehension as to this the cases may be mentioned again.

[RIDDELL, J.]

1925.

GEARY V. ALGER.

April 25.

Libel—Newspaper Report of Remarks of Counsel in Police Court Proceedings—Privilege—Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 11(1)—Evidence—Onus—Name of Plaintiff not Mentioned in Police Court but Given in Report—Report not "Fair and Accurate"—Objectionable Head-lines—Absence of Actual Malice—Damages.

In the defendant's newspaper was published what purported to be a report of a proceeding in a police court in which counsel for the accused therein made certain statements reflecting upon the character of the plaintiff. In the newspaper the name of the plaintiff was mentioned, and flaming head-lines preceded the report. At the trial of an action for libel, the evidence as to whether the name of the plaintiff was mentioned in the police court was conflicting. The defence rested upon sec. 11(1) of the Libel and Slander Act:—

Held, that the onus of proving the defence was upon the defendant, and it must be found that the name was not mentioned in court.

What is intended by sec. 11(1), which privileges a fair and accurate report in a newspaper of proceedings in public before a court of justice, is a report reproducing substantially what has taken place in court, and not a statement of some part of the proceedings, or flaming head-lines which form no part of the proceedings.

The head-lines were libellous, and constituted no fair and accurate report and no part of any accurate report. Therefore, the defence was not proved.

The action being tried (by consent) without a jury, the trial Judge assessed the plaintiff's damages at a substantial sum, but not so large a sum as if malice in fact on the part of the defendant had been shewn.

AN action for libel.

The action was tried by RIDDELL, J., without a jury, at Whitby.
G. D. Conant, for the plaintiff.

J. A. McGibbon, for the defendant.

April 25. RIDDELL, J.:—This is an action for libel, in which,

at the request of counsel for both parties, I tried the case without the assistance of a jury. The facts are not at all in dispute. Riddell, J.

1925.

GEARY
v.

ALGER.

One Kokernick, being charged with assaulting a police officer in the discharge of his duty, was brought before the Police Magistrate in the City of Oshawa. He was represented there by a member of the Bar, who pleaded guilty to a common assault, and made an address to the court, apparently asking for clemency to his client. The language which he used was somewhat startling, and such as I venture to think and to hope is not often heard in our courts of justice. Amongst other things he said: "Kokernick is before you only because he was aggravated and worried and nervous, following a conviction. He was aggravated not against the organised police, but at the betrayal of him into the hands of the police by a man . . . who had been his friend, to whom he had loaned money, a man who is lower than the mongrel cur that trots along the street, and is as great a betrayer as the greatest of all time, who sold his Lord and Master for 30 pieces of silver. He was aggravated by the man who betrayed every decency and who has no place in the community."

There was present at the hearing, if the proceeding can be called a hearing, a reporter for the Oshawa Telegram, a newspaper the property of the defendant; the reporter turned in his "copy," which was passed by the editor, and the newspaper published the statement, inserting, however, the name of the plaintiff in the place at which I have put the dots. There is dispute between the witnesses as to whether the name of the plaintiff was actually used in court or not—I shall return to that.

The newspaper, however, did not simply insert this statement but also headed it with flaming head-lines:—

"D. A. J. SWANSON CALLED SPOTTER LOWER THAN DIRTY MONGREL CUR THAT RUNS ABOUT THE STREET.

"COUNSEL USED STRONG TERMS. TERMED INFORMER ON A PAR WITH A JUDAS WHO BETRAYED HIS LORD AND MASTER.

"HAS NO PLACE IN THIS COMMUNITY."

An action is brought for libel. The defendant in his statement of defence denies the publication and alleges that the words are no libel; but the substance of the defence is that they are justified under secs. 8 and 11 of the Act respecting Actions for Libel and Slander, being R.S.O. 1914, ch. 71.

There is no doubt about the publication, and indeed that was not contested at the trial, nor is there now any pretence that there

Riddell, J. is a defence under sec. 8 of the Act; and the whole defence here must rest upon sec. 11, which reads as follows:—

1925.

GEARY
v.
ALGER.

“ 11.—(1) A fair and accurate report without comment in a newspaper of proceedings publicly heard before a court of justice if published contemporaneously with such proceedings shall be absolutely privileged, unless the defendant has refused or neglected to insert in the newspaper in which the report complained of appeared a reasonable letter or statement of explanation or contradiction by or on behalf of the plaintiff.”

The first question to be determined is, whether the name of the plaintiff was actually used; and as to that the evidence is contradictory. Upon the whole, as I think the onus rests upon the defendant to prove his defence, and not upon the plaintiff to disprove the defence, I hold that the name was not mentioned.

Indeed, were the onus upon the plaintiff rather than upon the defendant, which I think it is not, I would hold that the name was not mentioned. Consequently it cannot be said that the report is a fair and accurate report.

But there is more in the case than that small point. It is, in my view, quite clear that the object of the legislation was to permit a newspaper to publish what went on before a court of justice, as that is a matter of interest to all his Majesty's subjects. But what is intended is a report which will reproduce substantially what does take place in the court, and not a statement of some part of the proceedings, or flaming head-lines which form no part of a proceeding.

Upon this evidence I hold that the head-lines, being thus libellous, constitute no fair and accurate report and no part of any fair and accurate report, and consequently I find the defence not proved.

While I have no doubt that the reporter of the defendant desired to make a spicy report, a report with some “ pep ” in it, as it is called, or, to use his own terminology, desired to make the article “ snappy ”—for I know that the usual and commonplace does not make good “ copy ”—I am equally confident that the defendant did not have any malice in fact against the plaintiff; and, consequently, the damages which I must assess will not be so great as they would be were there anything indicating actual malice.

But the libel is wholly unjustified—it is a cruel thing to publish of any one—and substantial damages ought to be awarded. I think on the whole that justice will be done if I assess the damages at \$500 and direct judgment to be entered for the plaintiff for \$500 damages and full costs of suit, which I do.

[APPELLATE DIVISION.]

SHATFORD V. FOLEY GOLD MINES CO. LTD.

1925.

May 1.

Company—Action against for Wages—Defences—Release—Authority of Person Executing — Estoppel — Limitations Act — Acknowledgment.

Decision of ROSE, J., 56 O.L.R. 230, affirmed.

AN appeal by the plaintiff from the order of ROSE, J., 56 O.L.R. 230.

March 19. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, JJ.A.

W. N. Tilley, K.C., for the appellant.

H. J. Scott, K.C., for the defendants, respondents.

May 1. The judgment of the Court was read by LATCHFORD, C.J.:—This is an appeal from the order of Rose, J., of the 24th November, 1924, allowing an appeal by the defendants from the report in favour of the plaintiff of his Honour Judge McLennan, Local Judge at Fort Frances, to whom on consent of counsel the action had been referred under sec. 65 of the Judicature Act.

The learned Referee found that a certain trust-agreement dated the 6th October, 1917, was signed, though reluctantly, by the plaintiff, and that he did not sign or authorise or have knowledge of the signing on his behalf of what purported to be a relinquishment of his claims against the defendants.

Against the plea and contention of the defendants that the plaintiff's claim was barred by the Statute of Limitations, the referee reported that a memorandum of the 22nd December, 1919, signed by the president of the defendant company, and delivered by him to the plaintiff, was a sufficient memorandum to prevent the statute from operating, and further that a payment by the defendants to the plaintiff on the 22nd March, 1924, of \$490 out of the proceeds of a sale of the assets of the company also prevented the operation of the statute.

In his reasons for allowing the appeal, Rose, J., agrees with the finding of the referee that the plaintiff was not bound by the so-called release, but he dissents from the view that the document of December, 1919, and the payment made subsequently by the defendants to the plaintiff, prevented the incidence of the limitation of six years imposed by the statute.

App. Div.

1925.

SHATFORD
v.FOLEY GOLD
MINES CO.
LTD.Litchford,
C.J.

I cannot but agree in the opinion that the memorandum relied on by the plaintiff does not prevent the operation of the statute, but is merely a statement of what the plaintiff was at the time entitled to under the trust-agreement, and that the subsequent payments, like the memorandum itself, were referable wholly to that agreement.

I also find myself unable to add anything useful to the reasons given for the judgment in the Court below. Upon the facts and the law there stated, the appeal from the referee was rightly allowed. This appeal accordingly fails.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1925.

May 1.

RE DAVIDSON AND ROYAL COLLEGE OF DENTAL SURGEONS OF
ONTARIO.

Dentist—Suspension from Practice—"Improper Conduct in a Professional Respect"—Dentistry Act, R.S.O. 1914, ch. 163, sec. 27—Advertising—Professional Ethics—Powers of Board of Directors of College—Finding of Discipline Committee—Adoption by Board—Appeal to Court.

D., a member and licentiate of the college and a practising dentist, was found guilty of "improper conduct in a professional respect" (sec. 27, subsec. 1, of the Dentistry Act, R.S.O. 1914, ch. 163), by the discipline committee of the college, after inquiry and evidence taken on oath; and the board of directors of the college, adopting the committee's report, suspended D. from practice.

The "improper conduct" consisted in the publication in a newspaper of an advertisement by which the public were invited to take the opportunity of getting sets of teeth at special prices—a "special ten-day offer." The advertisement contained D.'s name and address. Upon appeal by D., under sec. 28 of the Act, it was *held*:—

- (1) That, the facts not being in dispute, and the college having established no standard of ethics applicable to advertising by its members, the finding of the committee, approved by the board, could not be regarded as wrong.
- (2) If it is shewn that a member of the college, in the pursuit of his profession, has done something with respect to it which would be reasonably regarded by his professional brethren of good repute and competency, as improper, it is open to the board of directors to decide that he has been guilty of "improper conduct in a professional respect."
- (3) The words used in sec. 27 (1) are, "guilty of any infamous, disgraceful or improper conduct in a professional respect"—but the association of "improper" with "infamous" and "disgraceful" does not colour the meaning of "improper," which is the last of a series not of equivalents but of diminutives.

Review of the authorities

Allinson v. General Council of Medical Education and Registration.
[1894] 1 Q.B. 750, specially referred to.

AN appeal by R. G. Davidson, a licentiate and member of the Royal College of Dental Surgeons of Ontario, from the decision of the board of directors of the college that the appellant, on account of improper conduct in a professional respect, should be suspended from practising as a dentist.

App. Div.

1925.

RE
DAVIDSON
AND ROYAL
COLLEGE OF
DENTAL
SURGEONS
OF
ONTARIO.

April 2. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, J.J.A.

H. J. Scott, K.C., and *J. A. Sweet*, for the appellant, contended that the Legislature had not, by the Dentistry Act, R.S.O. 1914, ch. 163, intended to bestow upon a board or a committee thereof the right of independently deciding whether or not, in any given instance, the professional conduct of a practitioner had been "improper" within the meaning of the statute. It could not have been the intention to rest the determination upon the consciences of the members of the discipline committee. They must base their decisions upon expert evidence submitted to them of the propriety or impropriety of the conduct complained of. Suppose evidence were adduced of a general practice having obtained in Hamilton with regard to advertisements of this sort. [ORDE, J.A.:—You would have to shew its continuance without hindrance for a length of time.] Until the board had crystallised its rules as to advertising, passed by-laws incorporating them, or in some other manner formally notified them to the licentiates, measures of the kind now in question could not be validly taken. Even if this decision of the committee were upheld it would mean nothing as a precedent. The statute now left the Court free to deal with the matter in its entirety as though it were the board. In none of the reported cases had advertising been found to be wrong unless it contained something of moral obliquity or quackery: *Re Washington* (1893), 23 O. R. 299, 310; *Re Crichton* (1906), 13 O.L.R. 271, 282, 284; *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750; *Re Cherniak and College of Physicians and Surgeons of Ontario* (1919), 46 O.L.R. 434.

I. F. Hellmuth, K.C., and *G. C. Price*, for the college, respondents, argued that the Court could review the decisions of the committee only in so far as the members thereof could be shewn to have acted unreasonably or in bad faith. An analogy might be drawn between the use of the word "improper," a word of much less weight than "infamous" or "disgraceful," in the enactment in question, and that of the word "unbecoming" in the Law Society Act, R.S.O. 1914, ch. 157, sec. 46. The real question at issue was whether the practice of dentistry was a trade or a profession. The Legislature had classed

App. Div.

1925.

RE
DAVIDSON
AND ROYAL
COLLEGE OF
DENTAL
SURGEONS
OF
ONTARIO.

it with the professions of law and medicine when it made use of the words in the section under discussion, "in a professional respect." This being so, advertising by practitioners was unprofessional and "improper." What was published was a card. Rulings as to the propriety of the conduct of members of the profession were practicable only in particular cases as they might arise. Reference to *Pratt v. British Medical Association*, [1919] 1 K.B. 244, at p. 269.

Scott, K.C., in reply, argued that the parallel which counsel had attempted to draw between the operation of the Dentistry Act and that of the Law Society Act was fallacious, inasmuch as in the latter case there was no right of appeal from the decision of the society.

May 1. The judgment of the Court was read by LATCHFORD, C.J.:—Appeal under sec. 28 of the Dentistry Act, R.S.O. 1914, ch. 163, against a decision of the board of directors of the Royal College of Dental Surgeons of Ontario, made on the 23rd September, 1924, upon a report and finding of the discipline committee of the college, to the effect that the appellant, Dr. B. G. Davidson, a licentiate and member of the college, practising in Hamilton, had been guilty of improper conduct in a professional respect. This conduct consisted in the publication in the Hamilton Spectator of the 27th May, 1924, of the following advertisement:—

"TEETH \$15 Single Set (Workmanship Guaranteed). (Photograph of double set of teeth.) I am making a special 'ten-day offer' to give you the opportunity to get teeth. Special prices for crown and bridgework during this time. Extractions and Fillings also. DR. B. G. DAVIDSON, 54½ JAMES ST. NORTH, opposite Arcade. Open evenings. Regent 3786. Graduate of Royal College of Dental Surgeons."

Advertisements of that character are regarded by the college as objectionable from an ethical and professional point of view.

The board, under sec. 27, subsec. 1, of the statute, has power to suspend the license of a member of the college "who has been guilty of any infamous, disgraceful or improper conduct in a professional respect." Of its own motion apparently, the board, under subsec. 4 of sec. 27, adopted a resolution directing its discipline committee to investigate the alleged improper conduct of Dr. Davidson. The procedure adopted was in accord with the requirements of sec. 27. The committee, consisting of four members of the college, or one more than a quorum, met at Hamilton on the 2nd September, 1924. Due notice (subsecs. 13 and 14) of the meeting had been given to Dr. Davidson, who attended before the

committee, and was represented by counsel. Evidence, taken under oath (subsec. 15), established beyond question that the doctor had published the advertisement considered objectionable and other similar advertisements. The doctor admitted that, on applying for admission to the college, he had signed this pledge: "When admitted to practise dentistry I will conduct my practice ethically, and will make all reasonable efforts to elevate the profession of dentistry and maintain its dignity and good name."

As required by subsec. 19, the committee reported to the board the evidence adduced and the committee's findings: (1) that the advertisement was inserted by Dr. Davidson and had his sanction and approval; and (2) that it constituted improper conduct in a professional respect; and consequently that Dr. Davidson was guilty of improper conduct in a professional respect.

Upon consideration of this report, the board, pursuant to subsec. 20, made an order:—

"(1) That the certificate of license to practise dentistry in Ontario of Dr. B. G. Davidson of Hamilton be suspended until such time as the Board shall receive satisfactory assurances from Dr. B. G. Davidson that he will cease from and not repeat the improper conduct of which he has been found guilty.

"(2) That the costs of the inquiry before the discipline committee be paid by Dr. B. G. Davidson after taxation."

The order was not to go into effect and become operative until ten days after service thereof upon Dr. Davidson.

Dr. Davidson did not give assurances of any kind that he would cease from advertising in the manner objected to, and launched the present appeal.

In several of the grounds of appeal it is variously stated that the advertisement was not published by Dr. Davidson or with his consent, privity, or knowledge. As there was abundant evidence to the contrary, these grounds were not pressed in the argument at bar. Another ground is that evidence tendered of the publication of similar advertisements by other dentists was rejected by the committee. This point also was not urged on behalf of the appellant. If the publication by Dr. Davidson was improper, the fact that others may have acted in the same way would not lessen the impropriety.

None of the facts is in dispute. The real ground of the appeal is that, the Board not having passed, as it was empowered by sec. 17 of the Act to pass, any by-laws "for the proper and better guidance . . . of . . . the members of the college," the college had established no standard of ethics applicable to advertising by its

App. Div.

1925.

RE
DAVIDSON
AND ROYAL
COLLEGE OF
DENTAL
SURGEONS
OF
ONTARIO.

Latchford,
C.J.

App. Div.
1925.

RE
DAVIDSON
AND ROYAL
COLLEGE OF
DENTAL
SURGEONS
OF
ONTARIO.
Litchford,
C.J.

members in the manner adopted by Dr. Davidson, and that it was wrong for the committee to report, without having evidence before it of what was improper in a professional respect, and for the board to decide, that what Dr. Davidson had done was improper conduct in that respect.

In his evidence Dr. Davidson admitted that the ethics of advertising formed a subject of instruction in the college, and that the only approved advertising was in the form of what is called "a legal card," simply giving the dentist's name, address, and "occupation," or special branch of the profession. He knew, because so notified in writing by the solicitors for the college, that his method of advertising was considered objectionable by the college, but desired to have his rights submitted to an appellate court in the event of the decision of the board being adverse, as it was.

What is or what is not ethical in any profession is not easy to define, and I am not aware that in this country any profession has formally stated any standard to which its members are required to conform. The reason is as obvious as that which has prevented our Courts from defining fraud. Yet we know that such standards exist, as codes of moral conduct existed before and apart from the Decalogue.

As Boyd, C., observed in *Re Crichton*, 13 O.L.R. 271, at p. 284, there are conventional rules, well recognised, though it may be not forming a written code, which obtain among the members of every learned and honourable profession.

In that case the offences against the comity of the medical profession were not considered to convey the imputation of moral delinquency involved in the terms there in question—"infamous or disgraceful conduct in a professional respect"—especially as it had not been proved, as stated by the learned Chancellor (p. 287), that Dr. Crichton put his remedy "forward dishonestly or carelessly, not for the good of the public, but for the gain of the advertiser," or, in the words of Mabee, J., p. 294, as "there was no sufficient or proper evidence upon which the appellant could be convicted of deceitful advertising, or attempting to impose upon the credibility of the public."

In the present case the question is not whether Dr. Davidson's conduct was infamous or disgraceful, and therefore involving moral delinquency, but merely whether it was *improper in a professional respect*.

The analogy between the powers of the defendants' Board and those of the Benchers of the Law Society is very close. The Benchers were empowered by sec. 44 of R.S.O. 1897, ch. 172, now sec. 46

of R.S.O. 1914, ch. 157, to inquire into professional misconduct or *conduct unbecoming* a member, and to discipline or exclude a person from membership of the society. Considering the reported cases, the analogy between professional misconduct of a member of the Law Society and improper conduct in a professional respect of a member of the Royal College of Dental Surgeons must be borne in mind, as well as the distinction between such conduct on the part of an Ontario dentist, and "infamous or disgraceful" conduct on the part of a member of the College of Physicians and Surgeons of Ontario. This power of inquiry was considered by Chancellor Boyd (*Re Crichton*, 13 O.L.R. at p. 287) to be more extensive than that possessed by the Medical Council, and as authorising Benchers "to deal with cases where the charge is a violation of the conventional or other regulations which are either prescribed or commonly observed in the (legal) profession;" while, in his view, the standard to be followed under the Ontario Medical Act is whether the conduct has been infamous or disgraceful in the ordinary sense of the epithets and according to the common judgment of men—an opinion adopted by Hodgins, J.A., in a medical case, *Re Cherniak and College of Physicians and Surgeons of Ontario*, 46 O.L.R. 434, at p. 442. In the same case Meredith, C.J.O., was of opinion (p. 441) that, applying either that standard or the standard in *Allinson v. General Council of Medical Education and Registration*, [1894] 1 Q.B. 750, Dr. Cherniak's conduct was infamous or disgraceful in a professional respect. According to an observation of Armour, C.J., in *Re Washington*, 23 O.R. 299, at p. 311, conduct may be more disgraceful in a professional respect than in the common judgment of mankind.

In the *Allinson* case a very strong Court, Lord Esher, M.R., and Lopes and Davey, L.JJ., united in preparing a standard to be applied to the words in the English Medical Act (21 & 22 Vict. ch. 90) "infamous conduct in a professional respect." I think that standard excellent as far as it goes. Applied to the case at bar, it is as follows: "If it is shewn that a member of the college, in the pursuit of his profession, has done something with respect to it which would be reasonably regarded as improper by his professional brethren, of good repute and competency, then it is open to the board of directors of the college to decide that he has been guilty of 'improper conduct in a professional respect.'"

The eight members of the board are chosen annually or as vacancies occur, one from each of the seven districts into which the Province is divided, elected by the members of the college resident in such district, and one by or from the faculty of the School of

App. Div.

1925.

RE
DAVIDSON
AND ROYAL
COLLEGE OF
DENTAL
SURGEONS
OF
ONTARIO.

Latchford,
C.J.

App. Div. Dentistry—secs. 4-7 of the Act. It is impossible to conceive that a
 1925. body so selected is not professionally of good repute and competency and capable of impartially deciding what is improper conduct in a professional respect.

RE
 DAVIDSON
 AND ROYAL
 COLLEGE OF
 DENTAL
 SURGEONS
 OF
 ONTARIO.

Latchford,
 C.J.

I desire to say that I have not overlooked the association of the word "improper" with the words "infamous or disgraceful." "Improper" is the last of a series not of equivalents but of diminutives. Each prior word includes the succeeding words or word. Improper is thus included in both "infamous" and "disgraceful," but it is itself much below either; and conduct that is improper may not be one or the other.

I think the appeal fails and should be dismissed with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

1925.

MILNE v. DURHAM HOSIERY MILLS LTD.

Jan. 17.
 May 1.

Company—Action against. for Damages for Deceit—Subscription for Shares Induced by Fraudulent Representations of Agent of Company—Election to Retain Shares—Action not Maintainable—Action not Brought until after Voluntary Winding-up of Company Commenced—Whether Action for Rescission of Subscription Maintainable—Insolvency.

On the 7th January, 1924, at a meeting of the shareholders of the defendant company, a resolution was passed, under the provisions of the Ontario Companies Act, for the voluntary winding-up of the company, and liquidators were appointed. On the following day, the plaintiff, who had subscribed and paid for shares of the capital stock of the defendant company, being induced to do so, as was found by the trial Judge, by the fraudulent representations of an agent of the company, began this action against the company to recover damages for deceit. The liquidators were (by leave) added as defendants:—*Held*, that the plaintiff had, by bringing his action for deceit, elected to retain the shares, and, thus being himself a shareholder, could not recover against the company.

Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317, followed. *Quare*, whether, if the plaintiff had sought rescission of his subscription, his action would have been defeated, because launched after the winding-up had commenced, on the principle laid down in *Oakes v. Turquand* (1867), L.R. 2 H.L. 325, as applied in *In re Scottish Petroleum Co.* (1883), 23 Ch. D. 413, that repudiation to be effective must take the form of proceedings to rescind before the winding-up commences—it was not clear upon the evidence whether the company was or was not insolvent, and it was unnecessary to determine whether the principle is applicable in a case where the winding-up is voluntary.

ACTION to recover moneys paid by the plaintiff for shares in the defendant company now in liquidation.

1925.

MILNE

v.

DURHAM
HOSIERY
MILLS LTD.

The action was tried by LENNOX, J., at a Toronto sittings.

G. H. Gilday and *W. Proudfoot*, for the plaintiff.

J. J. Gray, for the defendants.

January 17. LENNOX, J.:—By order of the Master in Chambers, H. Barber & Co., liquidators of the Durham Hosiery Mills Ltd., were added as defendants.

That the plaintiff was induced to enter into the impeached transaction and part with his money by the false and fraudulent misrepresentations of R. E. Wilson, and that these representations were material and the basis of the transaction, was clearly established at the trial—in fact not disputed. No purpose would be served by setting out my conclusions of fact as to this phase of the action in detail. I am of opinion that the statements set out in the 3rd, 4th, and 5th paragraphs of the statement of claim are substantially accurate.

It is true that the plaintiff attended a meeting of shareholders, as alleged in the 4th paragraph of the statement of defence. Until he attended that meeting he knew nothing of the way he had been swindled by Wilson. He knew that Wilson had run away, but had been informed that he had not appropriated any of the company's funds. The plaintiff had his stock certificates, and he believed, until his suspicions were aroused during the progress of the meeting, that he was duly entered as a shareholder upon the company's books for the amount subscribed. There was a lot of talk and argument and dictation and some threats indulged in at the meeting. The great volume of all this was produced by Mr. J. J. Gray, who, as solicitor, chairman, shareholder in the company (I presume), and officer, it may be, directed everything and dominated the meeting. This is perhaps to be expected when a forceful city lawyer, brimful of company law, and with knowledge in advance of the things to be accomplished and the snags to be avoided, exercises the various functions referred to, with nothing to restrain him beyond the scant knowledge and experience of a body of shareholders for the most part residents in and in the neighbourhood of a small country town. There were some shareholders at this meeting of ability and experience, but the views of these men were reflected and advanced by Mr. Gray; the paramount object being to obtain the sanction of the meeting to the agreement Mr. Gray had prepared in advance. The difficulties that presented themselves were perhaps accidentally disclosed by the preliminary ascertainment of the list of sharehold-

Lennox, J.
1925.

MILNE
v.
DURHAM
HOSIERY
MILLS LTD.

ers and the number of shares each held, and these were overcome, principally by Mr. Gray, by the shortest cuts possible: in the case of the plaintiff by threatening him with loss of what he was entered for, if he failed to vote, and telling him that the resolution would be carried whether he voted or not. That it would be carried was a foregone conclusion. Then why coerce him? The purpose is plain enough, namely, to procure evidence of ratification—evidence such as is now sought to be used. I am not forgetting that a litigant who has been defrauded in several ways, and, after discovery of a fraud sufficient to avoid the contract, unequivocally adopts it, has no new right to repudiate upon discovery of other frauds—at all events of the same character—but I am of opinion that here there has been no act of ratification on the part of the plaintiff. I don't think that voting, even if voluntarily, would amount to ratification. For a part of the money he had paid he stood as a duly registered shareholder. As to this he had a right to vote, for it is not pretended that at that time he knew that any of the representations made by Wilson, and by which he was induced to act, were untrue. An act brought about by duress (I refer to Mr. Gray's threat not denied by him or anybody else) cannot be given effect to by the Court, and the same is to be said if it was induced by misstatements (to put it very mildly) that he would forfeit his shares by refusing to vote.

It may be that the plaintiff is entitled to rank for his costs in priority to dividends, as he claims, but I was not referred to any authority to shew that that is so. As far as I recall, this was not referred to in argument; and I know of no authority.

There will be judgment for the plaintiff for \$5,000 and costs.

The defendants appealed from the judgment of LENNOX, J.

March 18. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, JJ.A.

J. J. Gray, for the appellants, referred to the Companies Act, R.S.O. 1914, ch. 178, sec. 171; *In re Scottish Petroleum Co.* (1883), 23 Ch. D. 413; *Derry v. Peek* (1889), 14 App. Cas. 339, 58 L.J. Ch. 864; *Stone v. City and County Bank* (1877), 3 C. P.D. 282; *Carler v. Durham Hosiery Mills Ltd.* (26th March, 1924, Ont. S.C., unreported); *Craven v. Smith* (1869), L.R. 4 Ex. 146.

G. H. Gilday, for the plaintiff, respondent, referred to the Companies Act, sec. 173; *Ontario Ladies' College v. Kendry* (1905), 10 O.L.R. 324; *Young v. Smith* (1915), 21 D.L.R. 97.

May 1. The judgment of the Court was read by ORDE, J.A.:—
The action is brought against the defendant company and (by leave, the company being in course of winding-up) its liquidators, for damages for deceit, the plaintiff having subscribed and paid for \$5,000 of the capital stock of the defendant company upon the alleged fraudulent representations of one of its agents.

App. Div.

1925.

MILNE

v.

DURHAM
HOSIERY
MILLS LTD.

Orde, J.A.

The subscription was obtained in the year 1922, and the finding of the learned trial Judge that the plaintiff was the victim of the false and fraudulent representations of Wilson, the company's president and manager, remains unshaken.

The shares for which the plaintiff subscribed were duly allotted and issued to him, and he later attended a meeting of shareholders. The defendants set up this attendance as ratification by the plaintiff of his subscription. The learned trial Judge finds that the plaintiff was not then fully aware of the falsity of Wilson's representations.

On the 5th December, 1923, the plaintiff's solicitors wrote the company demanding the return of the \$5,000 which the plaintiff had paid, and threatening proceedings. This letter does not state whether the money is demanded as damages for the deceit, or as money which would necessarily be repayable upon a rescission of the agreement to subscribe for the shares. It is open to either meaning. But its intention is really immaterial.

The directors of the company had been negotiating for the sale of the company's assets to another company called Durham Textiles Limited, and had entered into an agreement with that company to that end. The consideration for this sale was to consist of certain shares of the capital of the purchasing company. On the 7th January, 1924, at a meeting of the shareholders of the defendant company specially called for the purpose, a resolution was passed, under the provisions of the Ontario Companies Act, for the voluntary winding-up of the company and authorising the liquidators to distribute the assets in specie or after realisation thereof.

The plaintiff, on the 8th January, 1924, commenced his action for damages for deceit, the defendant company being then the sole defendant. The liquidators were afterwards joined as parties defendants.

It was suggested upon the argument that the shareholders' meeting was in fact held on the 8th January after the issue of the writ, and that the winding-up resolution had been antedated. There seems to be no justification for this suggestion, for the printed notice calling the meeting, which forms part of exhibit 13A, shews that the meeting was called for the 7th.

App. Div.

1925.

MILNE

v.

DURHAM
HOSIERY
MILLS LTD.

Orde, J.A.

The plaintiff finds two formidable obstacles in his path, neither of which is discussed by the learned trial Judge. The first of these is that his action was launched after the winding-up had commenced. If the action were for relief by way of rescission of his subscription, he is met at once by the principle, laid down in *Oakes v. Turquand* (1867), L.R. 2 H.L. 325, as applied in *In re Scottish Petroleum Co.*, 23 Ch. D. 413, that repudiation to be effective must take the form of proceedings to rescind before the winding-up commences. See also *Re National Stadium Ltd.* (1924), 55 O.L.R. 199, at p. 205.

In reply to this the plaintiff argues that this principle is confined to cases of insolvency, where the rights of creditors intervene, and does not apply where the winding-up is voluntary. Counsel for the defendants rely upon *Stone v. City and County Bank*, 3 C.P.D. 282, as authority for the argument that the rule is equally applicable to cases of voluntary winding-up. In that case the assets were not sufficient to meet the liabilities, and the judgments of the trial Judge, Lindley, J., and of the Court of Appeal, are expressly upon the ground that, the assets being insufficient, there was no distinction between a compulsory and a voluntary winding-up, and that the principle of *Oakes v. Turquand* was as applicable for the protection of creditors in the one case as in the other.

It is not clear here whether the company is insolvent or not. If that is the fact, it has not been emphasised at all. A demand for rescission or the return of moneys paid as a result of fraud is not likely to arise when a solvent company is being wound up voluntarily, though of course a company might have no creditors and yet upon a winding-up not have enough assets to repay its shareholders in full. Whether the principle of *Oakes v. Turquand* and *Stone v. City and County Bank* would apply in such a case, I do not think it is necessary now to determine, as I think the second objection to the relief claimed by the plaintiff is unanswerable.

The House of Lords laid down in *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317, that the principle which entitles one who has been induced by fraud to purchase goods, to retain the goods and sue for damages, does not apply to shares in a joint stock company. The subscriber for shares, as a shareholder, is a member or partner in the company itself, and "his only remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible—by a winding-up of the company or by any other means—his action for damages is irrelevant, and cannot be maintained."

As pointed out by Lord Cairns and Lord Selborne, the sub-

scriber has merged himself in a society to the property of which he has agreed to contribute, and to allow him to recover damages for deceit while he retains his shares has the effect of throwing upon his fellow-shareholders, many of whom may have joined the company after he did and who may be as innocent of fraud as the plaintiff himself, his share of the corporate debts and liabilities. He cannot at the same time approbate and reprobate. Being himself a shareholder, by charging the company with fraud he is in effect imputing fraud to himself—Lord Selborne at pp. 329 and 330.

The plaintiff has chosen to bring his action for damages for deceit, thereby electing to retain his shares. Whatever his right to such relief may be against Wilson, he cannot recover upon that footing against the company itself. The case seems a hard one, but the law is clear.

The appeal should be allowed with costs and the action dismissed but in the circumstances without costs.

Appeal allowed.

App. Div.

1925.

MILNE
v.

DURHAM
HOSIERY
MILLS LTD.

Orde, J.A.

[APPELLATE DIVISION.]

BENNETT v. PEATTIE.

1925.

May 1.

Survivorship—Husband and Wife Killed in same Railway Disaster—Wife (if Living at Death of Husband) Named as Beneficiary in Policies of Insurance—Evidence of Medical Witnesses as to whether Wife still Alive after Husband was Dead—Finding of Trial Judge—Reversal on Appeal—Costs—Presumption of Survivorship—Rules of Common and Civil Law—Application to Railway Disaster—Rights of Beneficiary Dying before Maturity of Insurance Contract—Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, sec. 142.

R.'s life was insured by two companies, both policies being payable on his death to his wife, if living, otherwise to his personal representatives. R. and his wife were travelling in an automobile which was struck by the engine of a railway train, and both were killed:—*Held*, upon the evidence, reversing the finding of the trial Judge, that the husband in fact died before the wife (LATCHFORD, C.J., dissenting).

In a civil action, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision—it is not necessary to prove a case "beyond peradventure of a doubt."

Where a case is complicated by the introduction of opinion evidence, particularly in cases where the testimony is that of medical men, it is the duty of the Judge to arrive at his own conclusion after carefully weighing and considering the evidence of the experts—it is not enough for him to say, "I doubt and cannot resolve the doubt because an expert also doubts."

The costs of an action to determine the question of survivorship were not ordered to be paid out of the insurance moneys—that would be

1925.
BENNETT
v.
PEATIE.

to compel the successful litigant to pay the costs of the unsuccessful. The principle upon which in testamentary cases costs are often ordered to be paid out of the estate is rarely applicable to disputes concerning insurance moneys.

Semble, the rules of the Common Law and of the Civil Law upon the subject of presumption of survivorship are illogical and unsatisfactory, and are difficult of application in cases of railway accidents and similar disasters. Legislation to clear up the situation is needed.

Quære, whether *Re Phillips and Canadian Order of Chosen Friends* (1906), 12 O.L.R. 48, was well decided, and as to the effect of sec. 142 of the Ontario Insurance Act, 1924, which confers certain rights where the beneficiary dies before the maturity of the contract.

LATCHFORD, C.J., was unable to draw from the evidence, which he carefully reviewed, the inference that the wife survived the husband.

AN appeal by the plaintiff from the judgment of MOWAT, J., at the trial, dismissing the action, which was brought by the administrator of the estate of Sarah Jane Roberts, deceased, against the administrator of the estate of her husband, J. J. Roberts, also deceased, for a declaration that the wife survived the husband, and that her representative was entitled to moneys arising from policies of insurance upon the husband's life.

March 18. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, J.J.A.

A. B. Cunningham, K.C., for the appellant, referred to "Presumption of Survivorship," an article in the Canadian Law Times, vol. 23, p. 329, and "The Problems of Survivorship," an article in the Green Bag, vol. 16 (1904), p. 237, particularly at p. 240.

J. E. Belfry, for the defendant, respondent, referred to *Re Phillips and Canadian Order of Chosen Friends* (1906), 12 O.L.R. 48; *Wing v. Angrave* (1860), 8 H.L. C. 183; *In re Green's Settlement* (1865), L.R. 1 Eq. 288.

May 1. LATCHFORD, C.J.:—This appeal is from the judgment of Mowat, J., of the 3rd February, 1925, dismissing the action, which was brought by the administrator of the late Sarah Jane Roberts against the administrator of the latter's late husband.

The Robertses and their two children were killed on the 2nd November, 1924, while crossing in an automobile the line of the Canadian National Railway near their home in the township of Pittsburgh.

Roberts carried life insurance in two companies—the London Life Insurance Company, for \$4,000, payable on his death to his wife, "or, if there be no beneficiary entitled," to his personal representatives, and the Imperial Life Assurance Company, \$1,000,

payable to his wife "if living," otherwise to his personal representatives.

The plaintiff, as administrator of the wife, claimed the insurance moneys, and brought the action for a declaration that the wife survived the husband and that the plaintiff was therefore entitled to the sums payable under the policies. The insurance companies did not contest their liability. The plaintiff necessarily rested his case on the allegation that the wife survived the husband.

The defendant denied this, alleging that Mrs. Roberts was "killed instantly with her husband or before him," and claimed to be entitled to the insurance moneys.

At the close of the case, the learned trial Judge stated that it was necessary for the plaintiff to prove beyond reasonable doubt that the wife had survived her husband, and, having regard to that proposition, concluded that it was impossible for him so to find. He said:—

"I do not base my opinion on the evidence of the railway men. They, no doubt honestly, think she was dead, but they are not competent to say, and there is little of that evidence that I accept as competent to form my opinion.

"Upon the evidence of these experts, scientific men, I do not think a case has been made out to prove beyond reasonable doubt that she did live (after her husband); the evidence of Dr. Connell shews that it is not conclusive to him, and how can it be conclusive to me? It is unfortunate we have not the facts. I do not think a case has been made out. A case like this, based on medical opinion, would probably fail—whichever party was plaintiff he had to satisfy the onus assumed. Medical evidence when differing produces that uncertainty which prevents success of the party affirming. I don't think it is a case for costs. The costs should be paid out of these insurance moneys, on both sides."

On a careful perusal of the evidence, and notwithstanding the able argument of Mr. Cunningham, I am unable to say that the learned trial Judge was wrong in concluding that the evidence failed to establish that the wife survived the husband.

The train, consisting, it is said, of an engine, tender and caboose, was running at great speed—60 miles an hour according to the evidence. It struck the automobile about opposite the rear seat. The two children and their father were thrown out on the right of way. The train ran on several hundred yards, at least 80 or 100 rods, before it could be stopped. Mrs. Roberts or her body was then found by the train-crew on the front of the engine and on its south side, covered by parts of the automobile.

App. Div.

1925.

BENNETT

v.

PEATTIE.

Latchford,

C.J.

App. Div.
1925.

BENNETT
v.
PEATTIE.

Latchford,
C.J.

To the engine-driver "she looked as though she was dead." He could not feel any pulse or find that she was breathing. The conductor says he "saw no sign of life." However, to Mr. Cunningham's question, "You made no examination of the body?" he answered, "No, I did not." He did not examine the other bodies except to satisfy himself, in his own mind, that, as in the case of Mrs. Roberts, there was no sign of life. The brakesman, as soon as the train stopped, went to the front of the engine. "I stepped up," he said, "on the pilot; the lady's head was fast and (in?) alongside the saddle casting, and I got her by the side of the head and worked her head up out."

"Q. Was she pressed in there? A. Her head was pressed in; the way she was lying, she could not be pulled out.

"Q. Did you have to take and pull her out? A. No, I had to twist her head a little bit one way from the direction it was in order to get it out.

"Q. Was she alive? A. No, she was not.

"Q. You are satisfied she was dead then? A. I am."

He did not feel her pulse or listen for her breathing, as the engine-driver had done in his presence.

The fireman also went to the front of the engine and found the woman lying on the pilot. He did not at the time examine her body. He had seen the engine-driver do that, and was satisfied that she was dead. After he and his mates had lifted her from the engine to the ground he tested her pulse and found no action. This man had served in the infantry and received training in first aid.

The four train-men then carried what they thought to be the dead body to the rear of the train and placed it on the caboose, with the arms by her sides and her feet projecting slightly into the doorway. The other members of the Roberts family were found lying to the north of the rails, the father with his head crushed in, and all undoubtedly dead, in the opinion of the four train-men.

Several of the Robertses' neighbours appeared on the scene shortly after the accident. One of them heard some of the train-men say that they thought Mrs. Roberts was alive when they picked her up. None of them examined the body. Two of them, White and Gillespie, testified that, when they saw her, her left arm was up lying across her forehead. Gillespie lifted the arm up and put it back in the condition in which he found it. If the arm had not been moved by some one after she was placed in the caboose, the woman must have lifted it into the position in which White and Gillespie found it, and was therefore living after she was placed

in the caboose. It is unfortunate that no evidence was given excluding the possibility that some one of the several persons who had seen Mrs. Roberts in the caboose had moved her arm from the position in which it had been left by the train-men. Dr. Sinclair, who had been telephoned for, reached the scene of the accident about 50 minutes after it occurred. He first examined Roberts and the children and saw that they were dead. He examined Mrs. Roberts in the same way. She looked, he said, as if she was just asleep and had not the sign of shock that was on the others. He says: "I looked at her pupils; her pupils were normal. They were not in the state that is usually found with death, or the same as the three others had, so I thought she could not be dead, and I took my stethoscope and listened for the heart and could get no heart-beat and no respiration. I looked at her pupils again, and after about five minutes I looked at the pupils again, and they were dilated. The body was warm. The face was warm and the hands were warm, so in my own mind I was convinced at the time that Mrs. Roberts had lived longer than the others and had not been dead very long."

The fact that the pupils were normal at first, and that later on they were dilated, indicated, he would say, "that she had not passed into a state of actual death until the pupils had dilated. He did not think that a person could have the left hand in the position in which he saw it and in the characteristic attitude that it was in and be dead. There is usually a relaxation in which the hand will fall away.

"His Lordship: I understood you to say that death had not been long before. In other words, you said she was dead? A. Yes, it must have occurred some time just about that time."

The only injury he found on Mrs. Roberts was a very superficial abrasion like a burn on the forehead and one leg fractured above the ankle.

Dr. Sinclair also found a tension in the eye-ball. This tension, he said, generally leaves the eye-ball in a few minutes after death. On cross-examination Dr. Sinclair was asked in regard to Mrs. Roberts: "Was her hip broken? A. I did not have her stripped?" His evasion of the simple question passed unnoticed, as it was not repeated. No examination of the body was made, he swears, by Dr. Sinclair. The coroner, Dr. Gardner, went so far as to say that he had no opportunity to strip the body, and that there was no evidence *that he could see* of injury to the body. His impression at the time was that she had survived the others. "I tried," he said, "to bring that out at the inquest, but could not get the

App. Div.

1925.

BENNETT

v.

PEATTIE.

Litchford,
C.J.

App. Div.
1925.

BENNETT
v.
PEATTIE.

Latchford,
C.J.

information on it." He saw no injury except the fracture of the leg and the bruise on the forehead, which he did not consider serious. His impression was that she died of shock following the accident. He found the woman very fleshy and apparently full-blooded, and admitted that a patient of that sort would naturally be expected to remain warm slightly longer than the other. He had heard the evidence of Dr. Sinclair, and it indicated to him that "death had not occurred very long before" Dr. Sinclair saw her. When asked how long her body would remain warm, he stated that it would be almost impossible to say. He did not know whether Mrs. Roberts's hip was broken or not, as he did not examine that. His conclusion, he said, was that, having regard to possibilities, she died within a short time before Dr. Sinclair saw her, half an hour at the most.

Why did these medical gentlemen not examine the body of the woman? Neither of them suggests that the bruise on the head or the broken ankle was sufficient to cause her death. That therefore must have resulted, as they doubtless well knew, from injuries to other parts of her body, and such injuries were undoubtedly sustained at the moment it was struck by the tremendous impact of the locomotive.

Dr. Austen, professor of surgery at Queen's University, called as a witness for the plaintiff, was asked if from his knowledge of surgery and anatomy he agreed with what Dr. Sinclair had said, and answered that he did. He admitted, however, that the heat of the body is a very variable factor. A large person lost heat more slowly than a thin one. Many features would vary this. He regarded the tension of the eye-ball as but "slight contributory evidence" of very recent death; "there are cases in which this tension is not lost for many hours, and I would discount it very largely." He thought that if the woman had been killed 45 minutes or so before Dr. Sinclair saw her, the relaxation of the pupil would have been evident. It was mainly on the evidence of Dr. Sinclair regarding the pupil that he judged that death had occurred less than 45 minutes before Dr. Sinclair saw her. He based no conclusion on the position of the hand, as "it might have been put there."

Giving expert evidence for the defence, Dr. Connell, a professor of medicine at Queen's University, who had 25 years' experience as a professor of pathology, stated that the bodily heat might even rise for a little time after death. The temperature might remain fairly normal in the case of a well-nourished, full-blooded person, for from half an hour to two hours. Eye-tension was very variable. Occasionally, he said, it is maintained for sev-

eral hours. Some cases were on record where the normal tension was maintained as long as 10 or 12 hours. As to the dilation of the pupil, he thought that might have been induced by the examination, as pressure on the eye-balls causes an alteration in the shape of the pupil after death. The maintenance of the bodily heat, the condition of the eye and the eye-tension, were, in his opinion, points that might be quoted as evidence that the woman was alive (he meant alive later than her husband), but they were not by any means conclusive.

Dr. Sinclair, recalled, said that there was no pressure on the eye-lids at the beginning. "I simply opened the eye-lids to see what the pupils were like . . . they were not unequal, both were alike . . . I looked at them when I was drawing the lids apart. There was no pressure made at that time. I did make pressure afterwards, and I looked at the pupils again, and the pupils were dilated five minutes afterwards, but they were not dilated at first; that is what caused me to go over the test of the heart a second time, because I could hardly realise that, with the pupils in that condition, all life was extinct."

How Dr. Sinclair could open the lids with his fingers as he did, and exert no pressure, passes my understanding. I have tried it in that way in my own case and find I always exert pressure. In any case, upon the evidence of Dr. Connell, the test is not conclusive.

Like the trial Judge, I am unable to draw the inference that the wife survived the husband. On the evidence, I think the proper finding is that Mrs. Roberts was killed when her husband and children were killed and that she could not be said to have survived her husband. The appeal should be dismissed.

MIDDLETON, J.A.:—I have read the careful judgment of my Lord, and it is with great regret that I find myself in disagreement with the conclusion at which he has arrived.

I assume for the purpose of this case that the law is correctly laid down in *Re Phillips and Canadian Order of Chosen Friends*, 12 O.L.R. 48, and that representatives of the wife can take nothing unless it can be shewn that she survived her husband. I do not now discuss the question determined in that case, but at some future time the conclusion there arrived at by a single Judge may have to be reconsidered by an appellate court. The applicability of the principles there established to the provisions of the Ontario Insurance Act of 1924, 14 Geo. V. ch. 50, may also have to be considered with care. I refer particularly to the provisions of sec. 142, which confer certain rights where the bene-

App. Div.

1925.

BENNETT
v.

PEATTIE.

Latchford,
C.J.

App. Div.
1925.

BENNETT
v.
PEATTIE.

Middleton,
J.A.

ficiary dies before the maturity of the contract. It may well be argued that there is a presumption of life, which can only be met by proof of death, and, where the right depends upon the exact moment of death, upon the proof of that moment.

Nor do I discuss what the law means by death. In the earlier days, when the rules of law were being evolved, death meant the cessation of respiration and of pulsation. It is now known that by appropriate means in many cases life may be saved even when respiration and pulsation have ceased. From the standpoint of judicial inquiry, I am inclined to the view that in cases where there has been no resuscitation death should be regarded as having taken place at the moment when respiration and pulsation ceased without entering into the inquiry that troubles biologists as to the exact line between life and death in the individual.

The rules of the Common Law and the rules of the Civil Law upon the subject of survivorship are alike illogical and unsatisfactory. Where upon the death of two the right depends upon survivorship, and the whole fund must go to one or the other according to the determination as a question of fact that one person killed in a common accident drew his last breath a moment after the other expired, the difficulty of the inquiry and the unsatisfactory nature of the result are obvious. There is no way by which a division of the property can be secured unless the common sense of the contending factions triumphs over the desire to litigate. Where the property is in the hands of a third party, each claimant may in his turn fail to recover because of his inability to satisfy the onus resting upon him.

For many purposes, under our system of law, a day is the least unit of time, and no notice is taken of a fraction of a day; but in a solution of the question in hand the exact moment becomes vital.

The Civil Law, which raises presumptions of a survivorship based upon the presumed strength of the individual, of the selfishness by which he would save himself at the expense of the weak, had, no doubt, its origin in cases of drownings at sea or similar catastrophes; but, in the case of a railway accident and similar disasters, mere bodily strength avails little. Legislation to clear up this situation seems to me to be needed.

Turning now to the facts of the case in hand. The one blow caused the death of both husband and wife. His death was admittedly instantaneous. All the train-hands thought the husband, wife, and children alike dead. Dr. Sinclair, arriving on the scene an hour after the accident, at once determined that the hus-

band and children were dead; but, upon viewing the body of the wife, he thought she still lived. There was no respiration, and no circulation, but there was such a degree of warmth, and the eye, upon inspection, was found to be in such a condition, as to lead him to the conclusion that death had occurred either just before or just at the moment of his arrival. If his evidence stood alone, unquestionably this would be the conclusion of any court. Experts gave evidence pro and con, basing their opinions upon the facts related by Dr. Sinclair. No one attacks his ability or sincerity. Dr. Connell has created so much doubt in the mind of the trial Judge that he has come to the conclusion that the case of those claiming under the wife has not been sufficiently proved.

According to Dr. Connell, the temperature found in the body might be the result of chemical action continuing some time after death. This is a possibility. The eye-changes might take place some time after death. They may result from "pressing on the globe of the eye." Ordinarily these changes are "very shortly after death, within a few minutes;" the things observed "are not conclusive evidence, in my opinion."

This evidence seems to me quite impotent when contrasted with the opinion of Dr. Sinclair with his opportunities for observation. It is based upon the theory that the things observed by Dr. Sinclair, all of which may be just possible, but seem to be in some respects most improbable, all occurred in this particular case. Dr. Connell does not say that in the case of this healthy woman, killed as she was, such chemical changes were under way in her body as to cause appreciable warmth, nor does he at all indicate that there was any such pressure on the eye as would cause that which was seen and appreciated by Dr. Sinclair.

I feel compelled to accept the evidence of Dr. Sinclair as to the facts observed by him and his opinion based upon those facts. I cannot believe that he would not at once appreciate the loss of heat in a body on this November day, if the woman had died at the same time as her husband, and would not have known that fact if she in truth had been dead nearly an hour. On the other hand, his actions shew the sincerity of his belief, because when he first saw her he thought she was alive, but when he found no respiration, nor pulsation, he thought that she must be dead, and upon looking at her eyes, and finding the condition which indicated life, he again sought indications of respiration and pulsation, and then observed the changes in the eyes indicating very recent death.

I am always disinclined to arrive at a different conclusion of fact to that reached by a trial Judge, but in this case I think my

App. Div.

1925.

BENNETT

v.

PEATTIE.

Middleton,
J.A.

App. Div.
1925.
BENNETT
v.
PEATTIE.
Middleton,
J.A.

learned brother has stated the case too strongly against the wife's representatives. "If you come to a court for a decision, you must prove beyond peradventure of a doubt, it must not be a guess." "This case must be decided upon opinion, the evidence of medical men." "Upon the evidence of these experts, scientific men, I do not think a case has been made out to prove beyond reasonable doubt that she did live." "The evidence of Dr. Connell shews that it is not conclusive to him, and how can it be conclusive to me?" "A case like this, based on medical opinion, would probably fail—whichever party was plaintiff he had to satisfy the onus assumed. Medical evidence when differing produces that uncertainty which prevents success of the party affirming."

It has always been held that there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision, and it is in the latter law that a higher degree of assurance is required, and the facts necessary to prove guilt must be established beyond reasonable doubt. Even in criminal cases it is not necessary to prove a case "beyond peradventure of a doubt."

When a case is complicated by the introduction of opinion evidence, particularly in cases of a medical nature, where doctors invariably disagree, it is, I think, the duty of the Judge to arrive at his own opinion after carefully weighing and considering the evidence of the experts, and availing himself of all the assistance they are able to give him, and himself to determine the question of fact in the light of that evidence, and it is not enough for him to say, "I doubt and cannot resolve the doubt because an expert says 'I doubt.'" In the case in hand I think Dr. Connell was allowed to go far beyond anything an expert is entitled to say, for he expressed not merely his opinion upon the facts proved, but his opinion as to the conclusion at which the Judge should arrive upon the evidence of other experts as well qualified to speak as he.

In my view, the appeal should be allowed, and the insurance money should be declared to go to those claiming under the wife. There should be no costs in the Court below, and the appellant should have the costs of the appeal.

I do not think it is proper to order the costs to be paid out of the fund, as this would be to compel the successful litigant to pay the costs of the unsuccessful. The principle on which costs are allowed in testamentary cases is that the property out of which the costs are to be paid is that of the testator, and that the costs are properly to be regarded as testamentary expenses, particularly when

the condition of affairs is occasioned by the testator himself in leaving his affairs in such a shape as to render the intervention of the Court necessary to secure due administration. This principle can rarely have application to disputes concerning insurance money.

ORDE and SMITH, JJ.A., agreed with MIDDLETON, J.A.

Appeal allowed (LATCHFORD, C.J., dissenting).

App. Div.

1925.

BENNETT

v.

PEATIE.

Middleton,
J.A.

[APPELLATE DIVISION.]

RE FOX AND CITY OF WINDSOR.

1925.

May 1.

Assessment and Taxes—Income Assessment—Assessment Act, sec. 5—Resident of Foreign Country—Income Earned and Received in Ontario.

The appellant, who earned and received a salary in a city in Ontario, but resided in a foreign country, was held not to be assessable by the corporation of the city where he earned his salary.

Section 5 of the Assessment Act imposes liability, but does no more, and nowhere in the Act or its amendments is any provision made for assessment of a person by a municipality other than that of which he is a resident.

City of Ottawa v. Keefer (1923), 54 O.L.R. 86, followed.

APPEAL by Benjamin Fox, upon a case stated by the Judge of the County Court of the County of Essex, from a decision of the Judge confirming an assessment of the appellant in respect of income.

April 1. The appeal was heard by LATCHFORD, C.J., MIDDLETON, ORDE, and SMITH, JJ.A.

A. H. Foster, for the appellant.

P. D. Davis, K.C., for the city corporation, respondents.

May 1. The judgment of the Court was read by LATCHFORD, C.J.:—Appeal by Benjamin Fox, upon a case stated, against an assessment on his income made by the Municipal Corporation of the City of Windsor, and confirmed on appeals to the Court of Revision and the County Court Judge.

The facts are not in dispute, and upon them the learned Judge asks if he was right in holding the appellant assessable for income by the city corporation.

Fox is an employee of a company which carries on business in Windsor, and he there receives an income on which the city cor-

App. Div.

1925.

RE FOX
AND
CITY OF
WINDSOR.Latchford,
C.J.

poration has so far contended successfully that he is liable to be assessed. He does not reside in Windsor, but in Detroit. He has a cottage at Tecumseh, in Ontario, which he occupies with his family during the summer. That fact, however, may be regarded as immaterial.

As was said by my brother Middleton in *City of Ottawa v. Nantel* (1921), 51 O.L.R. 269, 276, the residence of a person, for the purpose of sec. 5, should be taken to be his "chief home . . . his 'settled abode,' the home of his wife and children, the place of his *lares* and *penates*." To the same effect was the decision of this Court (differently constituted) on the 2nd April, 1924, in the unreported case of *City of Ottawa v. Hardy*, in which it was held that, while the Hon. Senator Hardy owned a costly furnished residence at the Capital, occupied by him and his family throughout the sessions of Parliament, Brockville was where he was resident within the meaning of the statute, and that, therefore, he was not subject to assessment on his income by the Corporation of the City of Ottawa.

The provisions of sec. 5 of the Assessment Act, under which the appellant was held liable to assessment on his income, are, so far as material, as follows:—

"All income . . . received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation," subject to exemptions inapplicable here.

The section imposes liability, but does no more, and nowhere in the whole Act or in its amendments is any provision whatever made for *assessment* of the income of a person by a municipality other than that in which he is a resident. The decision in *City of Ottawa v. Keefer* (1923), 54 O.L.R. 86, is directly in point.

The answer to the question submitted is 'No.'

Appeal allowed with costs.

[RIDDELL, J.]

1925.

May 4.

NEW ONTARIO COLONIZATION CO. LTD. V. GRAND TRUNK RAILWAY
SYSTEM

Sale of Goods—Notice by Unpaid Vendor to Carrier to Stop Delivery—Delivery by Carrier to Consignee notwithstanding Notice—Action by Vendor against Carrier—Right of Stoppage in Transitu—Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40, secs. 39, 43, 44—Consignee, whether Agent of Purchaser—Presumption—Evidence—Sufficiency of Notice—Meaning of "Claim" in sec. 45(1).

The plaintiffs, on the 21st March, 1921, sold goods to the T. company, and, on the instructions of that company, the goods were shipped

to the J. company, consigned by bills of lading of the 28th March. On the 29th March the defendants received the goods, and on the 30th March the goods were in transit on the defendants' railway. On that day the plaintiffs, being unpaid, orally notified an agent of the defendants to withhold delivery, and on the same day wrote the agent to "withhold delivery of the following cars of lath," giving the numbers of the cars, "Please see that they are held to our order." The letter was received by the agent not later than the 31st March. Without further instructions, the defendants, on the 4th April, or later, delivered the goods to the J. company. On the 6th June the T. company were declared bankrupt. The plaintiffs, receiving only a small dividend on their claim against the T. company for the price of the goods, brought this action against the carriers to recover the balance of the price, asserting a right of stoppage *in transitu* and claiming as damages the amount of their loss:—

1925.
—
NEW
ONTARIO
COLONIZA-
TION CO.
LTD.
v.
GRAND
TRUNK
RAILWAY
SYSTEM.

Held, that the plaintiffs were entitled to recover.

Where the purchaser of goods (in which he deals) directs the vendor to ship to a third person, not the purchaser's agent, the presumption is that the third person has purchased the goods in the ordinary way for valuable consideration; but here the presumption was met by evidence; the J. company were made consignees simply as agents for the T. company; there was no interruption in transit, no rights of third persons intervened; and the right to stoppage *in transitu* still continued: sec. 44 (1) of the Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40.

The notice to the defendants was sufficient.

"Claim," in sec. 45 (1), means "claim to stop delivery."

ACTION to recover \$1,235.64 as damages for the defendants' failure as carriers to retain for the plaintiffs goods shipped by them over the defendants' railway; the plaintiffs, as unpaid vendors, asserting a right of stoppage *in transitu*.

The action was tried, upon a statement of facts agreed upon by the parties, by RIDDELL, J., without a jury, at a Toronto sittings.

Everett Bristol, for the plaintiffs.

J. P. Pratt, for the defendants.

May 4. RIDDELL, J.:—This is an action based upon an alleged right of stoppage *in transitu*; at the hearing before me without a jury at Toronto, the parties agreed upon the facts, and the case falls now to be decided upon the law.

The plaintiffs, an incorporated company, having its head-office in Toronto and executive offices in Buffalo, on the 21st March, 1921, sold to the Toronto Timber and Cordwood Company Ltd., Toronto, two car-loads of laths, for \$1,666.10: on instructions of the Toronto company, these were shipped to C. W. J. Ltd., at Greenwood avenue, Toronto, from Jacksonborough, Ontario, on the 28th March, consigned to this company by bills of lading of the Canadian National Railway of that date. On the 29th March, the

Riddell, J. defendants received the laths, and on the 30th March the laths were in transit on the defendants' railway.

1925.
—
NEW
ONTARIO
COLONIZA-
TION Co.
LTD.
v.
GRAND
TRUNK
RAILWAY
SYSTEM.

On this day, the 30th March, the plaintiffs, being unpaid, notified the assistant general freight agent of the defendants at Buffalo, through a verbal communication by an officer of the plaintiffs, to withhold delivery—and the same day wrote him a letter to the same effect, received by him not later than the 31st March.

Without further instructions, the defendants delivered the laths to C. W. J. Ltd., on the 4th April, or later. On the 6th June, a receiving order was made in Bankruptcy against the Toronto Timber and Cordwood Company; the plaintiffs received a small dividend of 6.47 per cent.—the plaintiffs were to pay freight, and consequently claim only the balance—\$1,666.10, less \$430.46, equals \$1,235.64, payable on the 28th April, 1921.

It is admitted that the price is the ordinary market price then prevailing.

The plaintiffs rely upon the Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40 (Ont.), secs. 39, 43, 45*—and, while the right of an unpaid vendor to stop *in transitu* is admitted by the defendants, it is argued that the right did not arise in the present case for certain reasons:—

1. It is said that the plaintiffs, having issued bills of lading consigning the goods to a person other than the immediate vendee,

*The following are the material provisions of the sections of the Sale of Goods Acts referred to.

39.—(1) Subject to the provisions of this Act and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them.

43. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods, has the right of stopping them *in transitu*, that is to say he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

44.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a common carrier by land or water or other bailee, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such common carrier or other bailee.

45.—(1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods or by giving notice of his claim to the common carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

had no right to stop *in transitu* because of any claim against the immediate vendee.

The plaintiffs reply that in any case the right could be lost only if the consignee were a *bonâ fide* purchaser for value from the Toronto Timber and Cordwood Company; and contend that the onus of proof that such is the case is on the defendants.

I do not think so—where the purchaser of goods in which he deals directs the vendor to ship to a third party, not the purchaser's agent, the presumption is that such third party has purchased the goods in the ordinary way for valuable consideration. If the plaintiffs offered no evidence, the presumption would prevail.

Then evidence is given, on consent, that no record is to be found of any sale to the company of these goods or of any payment for the same by C. W. J. Ltd.—nor did the Toronto Timber and Cordwood Company claim against C. W. J. Ltd. in Bankruptcy. I think, on this state of facts, that the presumption is met—and that C. W. J. Ltd. were made consignees simply as agents for the Toronto Timber and Cordwood Company. Consequently, there was no interruption in transit, no rights of third parties intervened, and the right to stoppage *in transitu* continued to exist—sec. 44 (1) of the Sale of Goods Act.

2. The second point urged is the alleged insufficiency of the notice. The notice says: "Confirming telephone conversation of this p.m., will you please instruct your agent at Toronto by wire to withhold delivery of the following cars of lath" (identifying them by numbers). "These cars were both shipped by us on the 28th March, from Jacksonborough, Ontario, to C. W. J. Ltd., Greenwood avenue siding, Toronto, Ont. We will give you disposition orders on the above cars as soon as possible, but in the meantime please see that they are held to our order."

The defendants contend that there is no notice of their "claim" by the plaintiffs—as what the statute, sec. 45 (1), means is notice of his claim against the vendee or of the nature of his claim. But such is not the meaning: "Claim" here means "claim to stop delivery."

For example, in *Bohtlingk v. Inglis* (1803), 3 East 381, a simple demand for possession (p. 384) was held sufficient. In *Litt v. Cowley* (1816), 7 Taunt. 169, a notice not to deliver to the consignee but to an agent (named) of the vendor, was held sufficient. *Northey v. Field* (1738), 2 Esp. 613, is a weaker case than the present.

I think this objection also fails.

There is nothing in the defence, and judgment must go for the plaintiffs with costs.

Riddell, J.

1925.

NEW
ONTARIO
COLONIZA-
TION Co.
LTD.

v.
GRAND
TRUNK
RAILWAY
SYSTEM.

[APPELLATE DIVISION.]

1925.

NOBLE SCOTT LTD. v. MURRAY.

May 7.

Landlord and Tenant—Lease of Part of Building with Use of Lift for Goods—Destruction of Lift by Fire—Injury to Business of Tenants—Rent—Implied Agreement to Maintain Service—Whether Lift Part of Demised Premises.

AN appeal by the defendants from the judgment of ROSE, J., 56 O.L.R. 595.

May 7. The appeal was heard by LATCHFORD, C.J., MIDDLETON, J.A., LENNOX, J., and ORDE, J.A.

T. F. Battle and J. C. M. German, for the appellants.

J. O. Plaxton, for the plaintiffs, respondents.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, agreeing with the judgment of ROSE, J.

[IN CHAMBERS.]

1925.

REX v. BUSCH.

May 12.

Criminal Law—Magistrate's Conviction for Offence against Inland Revenue Act, R.S.C. 1906, ch. 51, sec. 180 (f)—Keeping or Allowing to be Kept Distilling Apparatus in Place Described in Conviction—Omission of Statement that Place "Owned or Controlled" by Accused—Conviction Defective—Amendment not Warranted by Evidence—Conviction Quashed—Whether Further Prosecution Open.

Section 180 (1) of the Inland Revenue Act of Canada, R.S.C. 1906, ch. 51, makes it an offence for any person without a license (f) to conceal or keep, or allow or suffer to be concealed or kept, in any place or premises owned or controlled by him, any still, worm, or other apparatus suitable for the manufacture of beer or spirits. The defendant was convicted by a magistrate for that he, the defendant, concealed or kept or allowed or suffered to be concealed or kept, at a shack (the location of which was described), on a day named, several stills and worms and other apparatus suitable for the manufacture of spirits, contrary to para. (f) of sec. 180 (1) of the Act:—

Held, that the conviction was bad on its face because of the omission of the words "owned or controlled by him;" and the evidence before the magistrate did not establish the defendant's ownership or control so as to permit of an amendment.

The conviction should therefore be quashed; and *semble*, there was nothing to prevent a further prosecution for an offence properly charged.

MOTION to quash a conviction made by the Police Magistrate for the Town of Kenora whereby the accused was, on the 14th April, 1925, convicted "for that he, the said William F. Busch, concealed

or kept or allowed or suffered to be concealed or kept, at a shack in or near East Hawke Lake, in the district of Kenora, on the 11th day of April, 1925, several stills and worms and other apparatus suitable for the manufacture of spirits and contrary to the statute in that behalf, being paragraph (f) of section 180 (1) of the Inland Revenue Act of Canada," for which offence the said Busch was condemned to pay a fine of \$500 and costs, and in default to be imprisoned for six months.

1925.
 REX
 v.
 BUSCH.

May 5. The motion was heard by MIDDLETON, J.A., in Chambers.

A. A. Macdonald, for the accused.

G. E. Parkinson, for the Crown.

May 12. MIDDLETON, J.A.:—The statute under which this prosecution took place is the Inland Revenue Act of Canada, R.S.C. 1906, ch. 51, as amended by several subsequent Acts. The section relied upon (sec. 180(1)) makes it an offence for any person without a license (f) to conceal or keep, or allow or suffer to be concealed or kept, *in any place or premises owned or controlled by him*, any still, worm, rectifying or other apparatus suitable for the manufacture of beer or spirits. It will be observed that the conviction, which follows in terms the information laid before the magistrate, omits the essential allegation that the stills or worms, etc., concealed or kept by the accused, were concealed or kept "in any place or premises owned or controlled by him," and this omission is made the foundation of the attack upon the conviction. Unless the conviction can be amended by the insertion of this essential allegation, the motion must succeed and the conviction must be quashed.

The difficulty in the way of making any amendment in this case arises from the fact that the necessity for determining that these stills were in premises owned or controlled by the accused does not appear to have been present to the mind of counsel prosecuting or the Justice hearing the case.

The facts are simple and may be shortly stated. A corporal of the Royal Canadian Mounted Police, on the 11th April, while patrolling in the neighbourhood of Hawke Lake, in company with another constable, saw the accused and another man upon the ice at 10 o'clock in the morning. Coming up to his tracks on the ice, the constable backtracked until the shore of the lake was reached at the mouth of the creek. The tracks were followed up the creek for a quarter of a mile, when they ended at a shack at the head of the creek. This being searched, five complete copper stills, having

Middleton,
J.A.
1925.
—
REX
v.
BUSCH.

a capacity ranging from 5 to 150 gallons, were found, with 1,500 lbs. of sugar, a quantity of yeast and raisins, and other material suitable for the manufacture of spirits. All the crates and packages containing these materials were addressed to the accused at Hawke Lake. The fire in the shack was burning, and it had apparently been recently occupied. The tracks leaving were fresh, and there were tracks going the opposite way, apparently made the night before. The accused, when seen by the constables in the morning, was drawing a toboggan with him. He occupies and operates a small store at a place called Hawke Lake, a mile and a half from the location of the shack. In the winter-time there is no one resident there save Busch and the station-agent and section-foreman. In the summer-time there are many hunters and campers in the district. Neither of the constables knew of the existence of the shack until they heard of it just before the occurrences mentioned. The only other evidence is that of a trapper who had been at the shack two years earlier. On that occasion Busch was there—"he was sitting down resting." It does not appear that this was inside the shack.

Had the magistrate, upon this evidence, found that the shack was owned and controlled by the accused, and if this finding had appeared in his conviction, I should have found great difficulty in interfering, in view of the decision of the Privy Council in *Rex v. Nat Bell Liquors Ltd.*, [1922] A.C. 128, 65 D.L.R. 1; for, upon such findings, the question would be one of interfering with a conviction made by a magistrate with respect to an offence over which he had complete jurisdiction; but, as the case stood, the conviction being upon its face defective and incapable of being supported without amendment, I think I am bound to see whether there is evidence which reasonably establishes that which is necessary to found an amendment; and here, in my view, there is none.

The conviction, therefore, being quashed because on its face it does not disclose an offence against the law, there is nothing that I can see to prevent a further prosecution for an offence properly charged.

It is not without significance that an unidentified man accompanied the accused. It may be that this unidentified man is the true owner of the shack, and that he purchased the sugar and other goods from Busch at his store at Hawke Lake Station and removed them in the original packages. I merely call attention to this as indicating one of the reasons why I think the essential fact of ownership or control of the shack by Busch has not been proved.

Order quashing conviction.

[MIDDLETON, J.A.]

CLARKSON V. SMITH & GOLDBERG.

1925.

May 12.

Set-off—Debt Owed by Partnership to Bank—Joint Indebtedness of Partners—Moneys in Bank to Credit of Individual Partner Hypothecated to Bank as Security for Joint Indebtedness—Equitable Considerations.

The firm of S. & G. was, before and after the 31st March, 1923, indebted to a bank upon an overdraft. On that date, the bank, as a condition of allowing the overdraft to continue, required S., one of the partners, to issue and deliver to the bank a cheque drawn upon his private account with the bank and attached to a "general letter of hypothecation," also signed by S. The cheque and letter were delivered to the bank on the day mentioned. The cheque had not been used, and no transfer of the sum represented by it had been made on the books of the bank up to the time when the bank went into liquidation on the 17th August, 1923:—

Held, that the indebtedness of the firm to the bank was a joint and not a joint and several debt, and there was no right of set-off of the joint indebtedness against the separate indebtedness of the bank to one of the debtors; but the hypothecation agreement differentiated the case from the simple one of an attempted set-off of a joint liability against a separate claim: as soon as it was agreed that the separate account of S. should be held as security for the joint account of S. & G., an equity arose which prevented the bank from asserting the joint liability without first giving credit for the amount standing to the credit of S.

Ex p. Hanson (1806-11), 12 Ves. 346, 18 Ves. 232, applied and followed.

An appeal by the defendants from the judgment or report of the Master of the Supreme Court of Ontario, to whom the action was referred for trial under sec. 65 of the Judicature Act, by an order of LOGIE, J., dated the 5th December, 1924.

The action was brought by the liquidators of the Home Bank of Canada against the firm of Smith & Goldberg to recover the amount of an overdraft.

The facts are stated in the Master's reasons for judgment, delivered on the 20th March, 1925, as follows:—

No oral evidence was submitted by either party—the defendants admitting the plaintiffs' claim if their contentions upon the legal position are not sustained, and the plaintiffs admitting the facts as set out in the affidavit of merits.

The single question to be determined in the action is, whether the defendants are entitled to insist upon the plaintiffs setting off against their claim on an overdraft by the firm of Smith & Goldberg of their account with the Home Bank of Canada, the amount of a certain cheque for \$3,000 drawn by Smith, one of the partners,

1925.
CLARKSON
v.
SMITH &
GOLDBERG.

against his personal account with the same bank, and delivered to the bank on the 31st March, 1923.

The firm of Smith & Goldberg was, prior to and on and after the date mentioned, indebted to the bank upon an overdraft in a sum in excess of \$8,000, since reduced, however, by payments to practically the amount of the cheque in question. On that date, the local manager of the bank, as a condition of allowing the firm to continue to carry the overdraft, required Smith to issue and deliver the cheque for \$3,000 already referred to, drawn upon his savings account and attached to a document under seal called a "general letter of hypothecation," also signed by Smith, whereby it was agreed that all bills, notes, etc., and other securities heretofore or hereafter lodged in connection with the account of the "undersigned" (not of the firm) and the proceeds of such securities should be held by the bank as a general and continuing collateral security for payment of the indebtedness of "the undersigned," and that the same might be realised by the bank in such manner as might seem to the bank advisable, and without notice to Smith in the event of any default in such payment. It was further agreed that the proceeds might be held in lieu of what should be realised (which is apparently meaningless), and might, as and when the bank thought fit, be appropriated on account of such parts of the said indebtedness and liability as to the bank might seem best.

This document, as it reads, is of course, not appropriately worded to serve the purpose for which it was probably intended. No reference whatever is made to the firm's debt, and to make it read as it should it would be necessary to substitute for "the undersigned," in the third line of the second paragraph, the words "the firm of Smith & Goldberg."

At the same time Smith signed and delivered to the bank a third document, which is also incomplete, inasmuch as it does not include the name of the customer to secure whose account the cheque was deposited, but it does, I think, make it clear that the cheque was deposited to secure the account of some one; and, in view of the admissions made, I do not think that much turns upon the imperfections of these instruments.

The cheque and the two other documents signed by Smith (which are attached together and form exhibit 1) were all delivered to the bank at the same time, on the 31st March, 1923. The cheque has not been made use of, and no transfer of the sum represented by it on the books of the bank has taken place. Nor was there anything, so far as the facts admitted disclose, to shew that any default on the part of Smith & Goldberg had taken place prior

to the 17th August, 1923, the date upon which the Home Bank went into liquidation, which would entitle the bank to appropriate to the overdraft the funds represented by the cheque. And that Smith was aware that no actual appropriation had taken place is clear from the fact that he applied several times for permission to withdraw moneys from his account to such an amount as would reduce his balance below the amount of the cheque, but was refused permission to do so.

There can be no doubt, I think, that the indebtedness of the firm to the bank is a joint and not a joint and several debt: Lindley on Partnership, 8th ed., p. 236; *Kendall v. Hamilton* (1879), 4 App. Cas. 504. See also our own Partnership Act, 1920, 10 & 11 Geo. V. ch. 41, secs. 11, 12, 13, and 14. And, that being so, there would ordinarily be no right of set-off unless what took place between the parties, as already detailed, amounts to an agreement that there should be: Halsbury's Laws of England, tit. "Bankruptcy and Insolvency," vol. 2, p. 214; and tit. "Set-Off and Counterclaim," vol. 25, p. 498. The present case is, I think, clearly distinguishable from the recent case of *Clarkson v. Robinet* (1924), 27 O.W.N. 346, inasmuch as the indebtedness of the defendants in that case was not joint, but joint and several.

I was, on first considering the matter, strongly inclined to the view that the arrangement was in fact an agreement between the bank, the firm, and Smith, whereby the bank's debt to Smith should be set off *pro tanto* against the firm's debt to the bank, notwithstanding the respective natures of the debts—that is, joint on the one hand and several on the other. That such an agreement may be effectually made, there is no doubt. See Halsbury's Laws of England, vol. 2, p. 214, and Lindley, 8th ed. p. 352. And the subsequent bankruptcy of either party does not affect the question if such an agreement was in fact come to: Lindley, p. 776.

But, considering the matter further, I have come to the conclusion that that is not the proper view to take, however hard the result may be upon the defendants. In its essence the arrangement come to was an agreement whereby Smith postponed his right to demand payment of the debt owing to him by the bank until the debt owing by the firm to the bank had been paid, with the right to the bank upon default of the firm to appropriate that debt to the firm account, as and when it might deem it advisable to do so, including the right not to appropriate it at all if it saw fit. There was in fact, when the bank suspended, no debt owing by the bank to Smith for which the latter could have successfully prosecuted an action. The position taken by the liquidators is, in substance, this,

1925.

CLARKSON
v.
SMITH &
GOLDBERG.

1925.
CLARKSON
v.
SMITH &
GOLDBERG.

that when the debt of the firm is paid in full then and not until then will Smith's rights revive, and it is a mere incident, although a most unfortunate one for Smith, that in the meantime the bank has failed; and, while the firm debt must be paid in full, Smith will receive only a fraction of his claim.

I have looked at all the authorities referred to by counsel and others not mentioned. I have already pointed out wherein I think the present case is distinguishable from that of *Clarkson v. Robinet*, 27 O.W.N. 346. Another case referred to by Mr. White, for the defendants, was *James v. Kynnier* (1799), 5 Ves. 108. That authority is dealt with by Lindley at p. 776, and the author points out that it is one rather of payment than of set-off and cannot be regarded as opposed to the rule that a joint debt cannot be set off against a separate debt.

Mr. Cassels, for the plaintiffs, relied chiefly upon *Watts v. Christie* (1849), 11 Beav. 546, which is in many respects like the present, but also distinguishable in this, that there was no agreement of any kind between the firm, the individual partner, and the banking house.

The case most like the present that I have found among the authorities looked at is one which was not referred to on the argument, *Ex p. Caldicott* (1884), 25 Ch. D. 716. The agreement came to there between the bank and the individual partner, a member of a firm indebted to the bank, was, except in some minor details, very similar to the present one, but in that case it was the partnership which became bankrupt rather than the bank. The latter filed a claim for the full amount of its overdraft, giving no credit for the amount on deposit to the credit of the individual partner, which, by agreement, it held as security for the firm's debt. The trustee insisted that credit should be given, but the Court held that it need not, that the arrangement was a *bonâ fide* one for the purpose of giving a security to the bankers, and they might prove against the joint estate without deducting the amount of the deposit, and that no set-off arose. On appeal this judgment was sustained. Lord Chancellor Selborne, in delivering judgment, said (p. 722): "It appears to me a fallacy to say that the money so deposited was a debt due from the bank to the father, in the sense that an action could have been brought by him for it, so long as it remained in the hands of the bank, and there was a balance due from the firm to them." And again, on the same page: "Being in substance, as it is in terms, a security, the principles which are applicable to securities, and not those which apply to mutual credits, appear to me to govern the case."

I am of the opinion, therefore, that the plaintiffs are entitled to judgment for the balance claimed, subject to certain minor adjustments which the parties have agreed to, and that neither the defendants as a firm nor Smith alone are entitled to the set-off claimed by them.

Costs should follow the event.

May 3. The appeal from the Master's judgment or report was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

H. S. White, K.C., for the defendants.

R. C. H. Cassels, K.C., for the plaintiffs.

May 12. MIDDLETON, J. A.:—The facts are not in dispute and are accurately set forth in the judgment of the learned Master. His conclusion that the indebtedness of the firm to the bank is a joint indebtedness, and that there is no right of set-off of the joint indebtedness as against the separate indebtedness of the bank to one of the joint debtors, is not attacked upon this appeal. What is contended is that the hypothecation of the amount standing to the credit of Smith as security for the indebtedness of the firm of Smith & Goldberg to the bank takes the case out of the general rule and entitles Smith to have the amount standing to his credit deducted from the amount for which he is liable.

The case is, I think, governed by a decision not cited to the learned Master or upon this appeal, *Ex p. Hanson* (1806-11), 12 Ves. 346, 18 Ves. 232, a decision of Lord Eldon which has not been doubted, and which has several times been applied to the solution of problems arising in bankruptcy. There the principle is established that where a joint debt is, by reason of the transactions between the parties, held as security for a separate debt, the creditor, upon equitable considerations, cannot resort to that security without allowing what he has received on the separate account for which the other was security. The converse is here true. As soon as it was agreed that the separate account of Smith should be held as security for the joint account of Smith & Goldberg, an equity arose which prevented the bank from asserting the joint liability without first giving credit for the amount standing to the credit of Smith. It is the hypothecation agreement that differentiates the case from the simple case of an attempted set-off of a joint liability against a separate claim.

The appeal should be allowed and the plaintiffs should pay the costs throughout.

1925.

CLARKSON
v.
SMITH &
GOLDBERG.

[IN CHAMBERS.]

1925.

BEAU MONDE LADIES' TAILORING CO. v. GARRETT.

May 13.

Judgment Debtor—Examination of—Rules 580-584—Order for Examination of Persons to whom or for whose Benefit Payments Made by Debtor—Application for—Examination, for Use on Pending Motion, of Person whose Examination is Sought—Rule 228—Difficulty in or about Execution or Enforcement of Judgment—Disposition of Property of Debtor—Questions to be Put upon Examination—Practice.

The plaintiffs, having obtained a judgment against the defendant for the recovery of money, examined him as a judgment debtor under Rule 580. Upon the examination it was disclosed that he had purchased and put in his wife's name certain land and had paid out money on account of the purchase-price and for interest and taxes; and also that he had made payments to his mother-in-law of sums which, he said, she had lent him. The plaintiffs served a notice of motion, under Rules 583 and 584, for an order for the examination of the two women, and obtained and served an appointment and subpoena for the examination of the wife as a witness on the pending motion:—*Held*, that Rule 228, being general in its terms, authorises such an examination for the purpose of using the evidence upon the motion.

Held, also, that a difficulty had arisen "in or about the execution or enforcement of a judgment," and an order should be made under Rule 584 for the examination of the two women.

Origin and history of the procedure regarding the examination of judgment debtors, consideration of Rules 580 to 584, and review of the authorities.

Seemle, that an order may be made under Rule 584 for the examination of other persons, although the judgment debtor has not himself been examined under Rule 580.

When an order is made for an examination under Rule 584, no ruling should be made as to what questions should or should not be answered upon the examination—any objection to the questions put should be raised before the examiner after the witness has attended and been sworn.

AN appeal by the plaintiffs from an order made in Chambers by an Assistant Master, upon the application of the defendant and Edna Garrett, his wife, setting aside an appointment and subpoena served by the plaintiffs upon Edna Garrett for her examination as a witness upon a pending motion launched by the plaintiffs, under Rules 583 and 584, for an order for the examination of Edna Garrett and her mother (Mrs. Larson) as to the estate and effects of the defendant, against whom the plaintiffs had an unsatisfied judgment for the recovery of money.

May 12. The appeal was heard by RIDDELL, J., in Chambers.

I. Levinter, for the plaintiffs.

I. Finberg, for the defendant and his wife.

May 13. RIDDELL, J.:—Judgment was obtained in December, 1922, against the defendant by the plaintiffs for \$1,215.75: a *fi. fa.* was returned *nulla bona* by the Sheriff of Toronto.

The defendant was, in February, 1923, examined as a judgment debtor, and on this examination it was sworn by the defendant that he, as agent for his wife, purchased for her and had put in her name certain property in Toronto valued at \$4,000—a first mortgage was placed thereon of \$6,000 and a second mortgage given to the vendor of \$2,000 in addition to \$2,000 paid in money—the defendant admits that he has paid over \$1,000 for interest, principal, and taxes since the purchase, his wife having no means to pay the same—he says, however, that the payments were made on her behalf.

The plaintiffs believe and all the circumstances indicate that they have good grounds for suspecting that the purchase was really the debtor's and not the wife's; and that the property is in reality that of the debtor. Of course, the debtor repudiates all interest in it.

Moreover, the defendant stated that he paid his wife's mother, Mrs. Larson, from time to time, large sums of money which he says he had borrowed of her.

The plaintiffs, with a not undue or unnatural curiosity, desired to examine the wife and mother-in-law as to the estate and effects of the debtor, his property and means at the time when the debt was incurred and now, and particularly as to the real estate and moneys expended thereon and as to the payments to the mother-in-law.

They thereupon served a notice of motion, under Rules 583 and 584, for an order for the examination of the two women; and took out an appointment and issued a subpoena *duces tecum* for the examination of the wife for use on the pending motion. The defendant's wife made an application to set aside the appointment and subpoena—the defendant joined in the application—and the Assistant Master granted the motion, with costs, fixed at \$18.50, payable forthwith—the order being specifically made “upon the application of the defendant and Edna Garrett.”

The plaintiffs now appeal, serving both the defendant and his wife.

No written reasons were given for the order appealed from, and neither counsel could inform me of the grounds of the learned Master's decision; the case, however, was fully argued in the light of existing authorities, and I am now able to dispose of the appeal.

The difficulty in the way of compelling an unwilling debtor—

Riddell, J.
1925.
BEAU MONDE
LADIES'
TAILORING
Co.
v.
GARRETT.

Riddell, J. and most debtors are unwilling—to pay a judgment against him
 1925. was notorious and a blemish on the Common Law of England—
 BEAU MONDE where personal incarceration failed there was nothing but goods
 LADIES' and personal chattels: and the *elegit* of the early Statute of West-
 TAILORING minster II. (1285), 13 Edw. I. ch. 18, did not help in most cases,
 Co. the *medietas terre sue* being generally wanting. Even before the
 v. abolition of personal imprisonment for debt under a *ca. sa.*, means
 GARRETT. were sought to circumvent the debtor who, having means, was
 evading payment. The “Lords’ Act” (1758), 32 Geo. II. ch. 28,
 we should now think too drastic—that (sec. 17) permitted the
 creditors of an execution debtor charged in execution for a debt
 under £100 to compel the debtor, on pain of transportation for
 seven years, to make discovery and surrender of his effects for
 their benefit—this Act was enlarged by (1786) 26 Geo. III. ch.
 44; (1793) 33 Geo. III. ch. 5; (1799) 39 Geo. III. ch. 50. This
 legislation was not adopted in our Province, but it is the fore-
 runner, prototype, and, in a limited sense, the progenitor, of our
 system of examination of a debtor after judgment. The value of
 such examination, of course, largely depends on the lengthened
 arm of the *fi. fa.* and the provision for attachment of debts.

The provision for the examination of a judgment debtor is now
 to be found in Rule 580: the proceeding has been found very
 valuable, and it should not be hampered by undue technicality.
 It is an examination of the strictest character: *Beattie v. Barton*
 (1882), 2 C.L.T. 104; *Re Central Bank of Canada, Watson’s Case*
 (1893), 15 P.R. 427—any question “fairly pertinent to the subject-
 matter of the inquiry . . . ought to be answered:” *Republic of*
Costa Rica v. Strousberg (1880), 16 Ch.D. 812; *McLean v. Bruce*
 (1890), 13 P.R. 504.

The debtor must post himself by reference to books and all
 other species of records, etc.: *Russell v. Macdonald* (1888), 12
 P.R. 458.

Our law goes farther and provides for the examination of other
 persons who are able, or who probably are able, to throw light on
 the debtor’s means—the clerk or employee, actual or past, the
 transferee of property (Rule 582), the person apparently in pos-
 session of any of the debtor’s property (Rule 583), may be examined
 —and Rule 584 is still more inclusive: “Where a difficulty arises
 in or about the execution or enforcement of a judgment, the Court
 may make such order for the attendance and examination of any
 party or person as may seem just.”

In the present case a difficulty has arisen “in and about the
 execution or enforcement of a judgment;” and, under this rule,

I should without question make the order asked for and have the wife and mother-in-law examined. No honest debtor and no honest relative should object to such an examination.

Riddell, J.

1925.

BEAU MONDE
LADIES'
TAILORING
Co.
v.
GARRETT.

In England, Order 42 provides for examinations such as are in question here. Order 42, Rule 32 (610), authorises an order to examine a judgment debtor in such cases as those in which we, by Rules 580 and 581, can now examine without an order—then Order 42, Rule 33 (611), is the same as our Rule 584, except that the English rule refers only to judgments or orders other than for the recovery or payment of money—and this distinction it is well to bear in mind.

In *Sturges v. Countess of Warwick* (1913), 30 Times L.R. 112, the object and import of Order 42, Rule 33, was considered. The language of Vaughan Williams, L.J., at p. 114, is not to be taken in too narrow a sense, but simply in connection with the facts of the case he was discussing. "He took the view that Rule 33" (substantially our Rule 583) "had reference to a matter which was not new and that the object of that rule was to make orders which had been made under Rule 32" (substantially our Rules 580, 581) "more efficacious"—I can find nothing in all the legislation or rules indicating that before an order can be made under Rule 584 an examination must have been made under Rule 580 or Rule 581, which required to be made more efficacious. That, however, is not of importance here, as an examination under Rule 580 has been in fact made—and the occasion has undoubtedly occurred which Rule 584 was intended to cover, and some of the subsequent language of the learned Lord Justice is fully applicable: "The information given here was such that a difficulty had arisen in and about the execution and enforcement of the" judgment. . . . "With the information which had been obtained at the first examination, it would have been wrong as well as imprudent for the judgment debtor to seize or realize this property. . . . It was impossible to know whether the circumstances were such as to justify the judgment creditor by means of execution in availing himself of the property . . ."

If the parties agree I shall turn this motion into a motion for an order for the examination of the wife and mother-in-law under Rule 584, the examination to be unlimited so far as the challenged transactions and the property, past or present, of the debtor are concerned—in which case the order of the Assistant Master will be set aside and the examination will proceed under this order; costs so far to be added by the plaintiffs to their debt.

But, if the parties do not agree, other considerations arise.

Riddell, J. Have the plaintiffs the right to examine the wife as a witness on a pending motion?

1925.

BEAU MONDE
LADIES'
TAILORING
Co.
v.
GARRETT.

Rule 228* is perfectly general in its language—although in the former King's Bench Division, the Court, of which I was a member, held that the rule did not apply to a motion against a verdict, I do not find any limitation in respect of such motions as one under Rule 584.

The case of *D. v. W.* (1912), 3 O.W.N. 993, was cited in support of the Assistant Master's order—but that is *nihil ad rem*. There the witness had been sworn but declined to answer certain questions; and my learned brother Middleton held that she was entitled so to decline. That is no authority for the proposition that there was no right to examine at all.

I am making no ruling as to what questions must and what questions need not be answered on an examination to be held. The proper course to pursue was recently laid down by myself in *Trusts and Guarantee Co. v. Dodds* (1924), 27 O.W.N. 294—the witness “should attend, be sworn, and raise his objections to the questions that are put—if they are objectionable The plaintiffs have every opportunity to frame their questions so as to obtain such information as they desire, the solicitor and client have every opportunity to raise objections.”

Trinity College v. Levinter (1923), 54 O.L.R. 290, may also be looked at.

The appeal should be allowed with costs of the motion before the Assistant Master and of this motion, payable by Edna Garrett and the defendant forthwith after taxation thereof.

[RIDDELL, J.]

1925.

LEFTLEY V. MOFFAT.

May 27.

Vendor and Purchaser—Contract for Sale of Land—Correspondence—Description of Property—Statute of Frauds—Id Certum est quod Reddi Certum potest—Action for Specific Performance—Lis Pendens—Registration of Certificate after Execution of Conveyance to another Purchaser—Refusal to Make New Purchaser Party to Action—Damages in Lieu of Specific Performance—Amendment.

The defendant, living in Saskatchewan, having sold part of a parcel of land in Ottawa, Ontario, to the plaintiff, who lived in Ottawa, wrote

* 228. Any party may be subpoena require the attendance of a witness to be examined before any officer having jurisdiction in the county in which the witness resides, for the purpose of using his evidence upon any motion.

to the plaintiff asking him "to take that other lot for whatever taxes there are against it and if you see fit to give me \$100 after that all right, if not all right." The plaintiff answered by letter accepting the proposal and saying that he would pay the taxes on the property and would send the defendant \$100 when it should be sold. The defendant, shortly afterwards, sold the property to other persons for \$400. This action, for specific performance, was commenced and a certificate of *lis pendens* was registered on the 14th November, 1924. The defendant's deed of conveyance to the new purchasers was executed before that date, but was not registered until the 19th November, 1924:—

Held, that the description of the property in the correspondence was sufficient to satisfy the Statute of Frauds, on the principle *id certum est quod reddi certum potest*.

But the execution of the deed before the commencement of the action and registration of the certificate made it impossible for the Court to adjudge specific performance; and, the plaintiff refusing to make the purchasers parties to the action, no relief could be granted as against them.

Sanderson v. Burdett (1869), 16 Gr. 119, followed.

The effect of the registration of a certificate of *lis pendens* considered.

Brock v. Crawford (1908), 11 O.W.R. 143, referred to.

Damages may be awarded where the defendant by his own act disables himself from giving specific performance.

McIntyre v. Stockdale (1912), 27 O.L.R. 460, followed.

The plaintiff was allowed to amend his pleading by claiming damages directly as in a common law action without claiming specific performance or by claiming damages as in a common law action in the alternative; and judgment for the recovery by him of damages and costs was pronounced.

An action for specific performance and other relief, the plaintiff residing in Ottawa, Ontario, and the defendant in Moosejaw, Saskatchewan.

The action was tried by RIDDELL, J., without a jury, at Ottawa.

W. C. Greig, for the plaintiff.

J. E. Caldwell, for the defendant.

May 27. RIDDELL, J.:—The defendant, in the year 1919, became the owner of certain property in Ottawa, and sold part of it to the plaintiff. She, residing in Moosejaw, was anxious to dispose of the remainder of the property, and the plaintiff was trying to sell it for her. The efforts being unsuccessful, she, on the 17th May, 1923, wrote to the plaintiff offering him the land for \$800, he to pay the taxes.

This offer was not accepted, and on the 25th August, 1924, she wrote to the plaintiff: "I am going to ask you to take that other lot for whatever taxes there are against it and if you see fit to give me \$100 after that all right, if not all right. I just cannot pay taxes on it, and it will go that way I am afraid. So if you will

1925.

LEFTLEY
v.
MOFFAT.

Riddell, J. find out just what is against it and you think it worth while, go after it.”

1925.

LEFTLEY

v.

MOFFAT.

The plaintiff answered, on the 9th September, 1924, accepting the proposition and saying that he would pay the taxes on the property and would send the defendant the \$100 when it should be sold. The letter continued thus: “Will you write to the lawyer, Mr. E. P. Gleason, and get him to make the deeds over to Mr. Leftley.”

Shortly thereafter, the defendant wrote the plaintiff that the letter had been received accepting the offer, and that she was writing to Mr. Gleason by the same mail, and hoped that everything should be satisfactory.

The plaintiff called on Mr. Gleason, and was not very cordially received, it being suggested that he ought not to have made the deal.

The solicitor seems to have communicated with the defendant and advised her not to go on with the transaction, although he prepared the deeds and sent them out to Moosejaw for execution. The plaintiff, shortly afterwards telephoning the solicitor, found to his surprise that the defendant did not intend to complete the transaction, and he wrote her accordingly, on the 31st October, stating, as was the fact, that he had sent her \$10 on the bargain.

On the 3rd November, 1924, the defendant wrote the plaintiff saying: “You will be rather surprised to know that I backed down on the selling of my lot. I wrote to Mr. Gleason asking him to advise you about the selling of my lot, and he was very much annoyed at me, and, as you asked for the deed before paying the money, I could not do that, so I asked him if he would make me an offer above what you said you would pay, and he did and I accepted it. I will admit it was rather a shabby thing to do, but the extra will mean a great deal to me, and he will have it cheap then. I hope you will not think too hard of me.”

On the following day she wrote saying that she had not received the \$10, nor had she asked for it; that she felt rather guilty and hoped that the plaintiff would not make things any harder for her than was necessary.

The solicitor busied himself to find a purchaser, and ultimately did find purchasers, who bought the land for \$400. He instructed his client to change the name of the grantee in the deed, which he had sent out and insert the names of the purchasers, and this deed was executed before the 14th November, 1924.

This action was begun on the 14th November. In the meantime, however, and before the issue of the writ, the conveyance had

been executed by the defendant to the new purchasers and sent to the solicitor in Ottawa, but it was not registered until the 19th November, 1924.

The plaintiff declines to make the purchasers parties to the action.

Riddell, J.

1925.

LEFTLEY

v.

MOFFAT.

I have no doubt that the description of the property in the correspondence is amply sufficient to satisfy the Statute of Frauds, on the principle *id certum est quod reddi certum potest*; but the difficulty in the way of specific performance is the execution of the deed before the registration of the certificate of *lis pendens*. I considered the effect of the registration of a certificate of *lis pendens*, and used the following language, in *Brock v. Crawford* (1908), 11 O.W.R. 143, at pp. 145 and 146:—

“The certificate must be distinguished from the *lis pendens* itself. The phrase ‘*lis pendens*’ means precisely what its component words indicate, ‘law suit pending’—and what is sometimes called the doctrine of *lis pendens* was well known and recognised in England many years before the organisation of our Court of Chancery. For example, in 1746, Lord Chancellor Hardwicke in *Worsley v. Earl of Scarborough*, 3 Atk. 302, says: ‘There is no . . . doctrine in this Court that a decree . . . shall be an implied notice to a purchaser . . . but it is the pendency of the suit that creates the notice; for, as it is a transaction in a sovereign Court of justice, it is supposed that all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people’s purchasing a right under litigation.’ The theory, object, and extent of the doctrine are here set out with great clearness: the effect being that purchasers for valuable consideration without actual notice were sometimes defrauded of their purchase by the operation of this rule of implied notice by *lis pendens*. Parliament interfered in 1839, and by the Act 2 & 3 Vict. (Imp.) ch. 11, sec. 9, provided that no *lis pendens* should bind a purchaser or mortgagee without express notice, unless a memorandum, much the same as our certificate, were left with the senior Master of the Court of Common Pleas.

“When our Court of Chancery was constituted by 7 Wm. IV. ch. 2, the doctrine was in full force, and upon the reorganisation in 1849 by 12 Vict. ch. 64, the English legislation as to *lis pendens* was not introduced. In 1855, however, by 18 Vict. ch. 127, an Act to amend the Registry Laws of Upper Canada, it was by sec. 3 provided in practically the same language as in the Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 97. See also 20 Vict. ch. 56, sec. 9.

Riddell, J.

1925.

LEFTLEY
v.

MOFFAT.

"The whole effect of registering a certificate of *lis pendens* is to place the whole world in the same position as though the legislation had not been passed."

Neither the issue of the writ nor the registering of the certificate of *lis pendens* has any effect upon preceding and executed transactions. That was settled as long ago as *Sanderson v. Burdett* (1869), 16 Gr. 119, and I think that principle has never been questioned.

It is argued on behalf of the plaintiff that the new purchasers had full notice of the previous transaction by reason of the knowledge of the solicitor. I am not able to give effect to that argument or to find that the solicitor was acting for these purchasers. But in any case I conceive that to be immaterial, because the plaintiff declines to add the new purchasers as parties to the action, and under such circumstances no relief can be granted as against them.

It being impossible to decree specific performance upon this state of facts, the question remains whether damages may be granted instead.

There has been some difficulty as regards the power and policy of the Court in respect of damages where specific performance cannot be awarded; the case of *McIntyre v. Stockdale* (1912), 27 O. L. R. 460, lays it down that damages may be awarded where the defendant by his own act disables himself from giving specific performance, and I follow that case, agreeing with it as I do.

But, if there were otherwise any difficulty, it may and should be got over on ordinary principles of amendment. The plaintiff may amend his record by claiming damages directly as in a common law action without claiming specific performance or he may claim damages as in a common law action in the alternative.

I think judgment should go for the plaintiff for damages and costs on the Supreme Court scale; the damages, unless the parties agree, to be determined by the Master at Ottawa or such other referee experienced in the practice of the Courts as the parties may agree upon.

[RIDDELL, J.]

BANNERMAN V. BINKS.

1925.

May 27.

Trusts and Trustees—Will—Direction to Sell Land—Absence of Authority to Mortgage—Money Raised by Trustees upon Mortgage to Improve Property and Procure Advantageous Sale — Whether Breach of Trust — Money Retained by Trustees at Request of Cestui que Trust.

The defendants, two of the daughters of a testator, were named in his will as executrices and trustees, and to them he devised all his property in trust to sell and to distribute the proceeds equally amongst his three daughters—the defendants and the plaintiff. The real estate consisted of a parcel of land with a frame house of little value upon it. The defendants made every effort to sell this property, but it was found not to be saleable as it stood, and they were advised to erect a suitable building upon the property and then offer it for sale. This they did, raising the money by a mortgage upon the property, and a sale was effected at a reasonable price:—

Held, that, although the trust for sale did not authorise the execution of a mortgage by the trustees, the defendants, having acted as prudent vendors in the best interests of the estate, were not guilty of a breach of trust.

Semble, if there were a technical breach of trust, the defendants ought to be excused.

Held, also, that the defendants were not chargeable with a breach of trust in respect of the plaintiff's share of certain moneys which formed part of the estate of the testator—her share having, at her request, been left in the bank to the credit of the estate and being at all times available to her.

ACTION against trustees under a will for an account and an administration order, the plaintiff alleging a breach of trust.

The action was tried by RIDDELL, J., without a jury, at Ottawa. W. C. Greig, for the plaintiff.

T. D'Arcy McGee, for the defendants.

May 27. RIDDELL, J.:— The plaintiff and the two defendants are the daughters of the late John Gallagher, who died in 1923, leaving his last will and testament whereby he appointed the defendants, two of his daughters, executrices and trustees of his will, and to them devised all his property, not otherwise disposed of, upon trusts, after the death of his wife, "to sell call in and convert into money my said estate or such part thereof as shall not consist of money and shall out of the moneys produced by such sale calling in and conversion and with and out of my ready money distribute the corpus of my said estate equally amongst my three daughters."

Riddell, J.

1925.

BANNERMAN

v.

BINKS.

The wife predeceased the testator, so that this clause of the will became operative immediately after his death. The money in the bank and elsewhere was equally divided amongst the three within a short time after the death. The plaintiff asked that her share should remain in the bank in the name of the estate, for personal reasons not necessary here to mention.

All the remainder of the personal estate, consisting of furniture valued at some \$50, was given to the plaintiff by the defendants.

The real estate consisted of a lot in the city of Ottawa, upon which was built a frame house of little value; and it was agreed by and between the three daughters that the plaintiff should occupy the house and lot, paying the taxes, but otherwise free of rent, until the property could be sold.

The defendants were anxious that the property should be sold, and placed it in the hands of reliable firms of real estate brokers in the city of Ottawa, and every legitimate efforts was made to dispose of the property, but it was found impossible to obtain a reasonable price for it.

Finally the plaintiff refused to pay the taxes any longer; and thereupon the defendants, having no means whereby to pay these taxes, in order to save the property from being sold for taxes, made still further efforts to sell. They were advised, however, that it was impossible to sell the property, in the condition in which it was then, for any reasonable figure, and that the best way to bring about a sale was to put a building upon the property and then offer it for sale. This they did, raising the money by a mortgage, and a sale was effected, at what all the evidence which is credible shews is a reasonable if not a very good price.

The plaintiff complains that the defendants were guilty of a breach of trust in building as they did, and that they ought to have sold immediately after the death of the father.

The plaintiff also complains that she was not told that her share of the money was still in the bank.

So far as this latter complaint is concerned, little need be said. The plaintiff herself desired that her money should be kept in the name of the estate, and that request was acceded to for her advantage and not for the advantage of the estate or the executrices. The deposit in the bank seems to have passed from the mind of all parties. The defendants, having left the matter in the hands of their solicitor, leaving with him also the bank-book, were astonished to find a few days before the trial that the plaintiff had not drawn the amount. Of course to draw this sum

she would have required to obtain the pass-book, but that was in the hands of the solicitor for the estate. The plaintiff herself seems to have forgotten all about it, and indeed she could not recall having made the arrangement already spoken of, although she would not deny that it was made. Pressed as she was at times for money, this sum does not seem to have occurred to her, and she never at any time made any application to the defendants or the solicitor for the money. If she had, it would have been given to her immediately. She was equally astonished with the defendants to find that the money was in the bank. I cannot find any kind of improper conduct in all this, and fail to understand why it is now complained of.

As to the real estate and the sale of it, of course the trust for sale, if there be nothing to negative the testator's intention to convert the estate absolutely, will not authorise the trustees to execute a mortgage: *Haldenby v. Spofforth* (1839), 1 Beav. 390; *Stroughill v. Anstey* (1852), 1 DeG.M. & G. 635; *Page v. Cooper* (1853), 16 Beav. 396; *Devaynes v. Robinson* (1857), 24 Beav. 86.

But the object of making the mortgage was not simply to raise money and then delay the actual sale. The making of the mortgage was a means whereby the property could be put in such a position as that it could be sold with advantage.

The trustee for sale is of course bound to sell the estate under every possible advantage to his cestuis que trust: *Downes v. Grazebrook* (1817), 3 Mer. 200, 208; *Orme v. Wright* (1838), 3 Jur. 19.

In selling the trustees must exercise good judgment, that is, sell in the manner which would be followed by a prudent vendor. They are not called upon to sacrifice the property for an immediate sale, and indeed such a course would be a breach of trust. They are called upon to exercise due care and prudence, avail themselves of proper advice, and act in all respects not only honestly but intelligently.

I find in this case that the defendants used every possible means to sell the property; that they took the best advice available; that they followed that advice and acted in every way as a prudent owner of the property would act. I am wholly unable to see any breach of trust on their part.

It must not be forgotten that they were not only trustees for the plaintiff, but were themselves interested to the extent of two-thirds of the property. That they did the best they knew how there can be no doubt; and, even if there were a technical breach of trust, which I think there was not, they ought to be excused.

The property now having been sold, and the only thing re-

Riddell, J.

1925.

BANNERMAN

v.

BINKS.

Riddell, J. maining being to divide the assets, I think there should be no order
 1925. made for administration, but there will be reserved to the de-
 BANNERMAN v. defendants the right to apply in the proper quarter for compensation
 BINKS. for their services as trustees and executrices.

The action will be dismissed with costs, reserving to the de-
 fendants the right already spoken of.

[APPELLATE DIVISION.]

1925.

LEDYARD V. CHASE.

May 28.

*Limitation of Actions—Title by Possession to Marsh-lands—Enclosure
 —Occupation — Pasturing of Cattle — Shooting and Trapping—
 Sporadic Acts of Trespass—Failure to Prove Possession or to Prove
 Exclusion of True Owner.*

Possession of land necessary to bar the title of the true owner must be
 an actual, constant, visible occupation, by some person or persons,
 to the exclusion of the true owner, for the full statutory period: the
 possession must not be equivocal, occasional, or for a special or tem-
 porary purpose.

McConaghy v. Denmark (1880), 4 Can. S.C.R. 609, and *Sherren v.
 Pearson* (1887), 14 Can. S.C.R. 581, followed.

Enclosure by a fence is not occupation—it is evidence, but not conclu-
 sive evidence, that such occupation as exists is exclusive.

Where the only kind of occupation shewn by the defendant, in an action
 brought against him for trespass upon marshy lands the paper title
 to which was in the plaintiff, was the roaming of cattle over the
 marsh from time to time, the shooting and trapping of muskrats,
 and the like—mere sporadic acts of trespass—it was *held*, that the
 defendant had failed to prove possession such as is required by the
 Limitations Act.

Per MASTEN, J.A.:—The real owner was not, upon the evidence, actually
 excluded by the defendant.

AN appeal by the plaintiff from the judgment of LOGIE, J., at
 the trial (13th March, 1925), dismissing an action for an injunc-
 tion in respect of a trespass to land, and for a declaration defining
 the true boundary-line between the plaintiff's land and that of the
 defendant.

May 26. The appeal was heard by RIDDELL, J., MIDDLETON,
 MASTEN, and SMITH, JJ.A.

J. H. Rodd, K.C., for the appellant, argued that the adverse
 occupation upon which the defendant relied was, by its nature,
 not sufficiently complete to support his claim to title by possession.
 Moreover, the fence with which the defendant claimed to have

enclosed the lands could not, upon the evidence, have been maintained in such a way as to shew "continuous, visible" possession. Reference to *Piper v. Stevenson* (1913), 28 O.L.R. 379, at p. 388; *McConaghy v. Denmark* (1880), 4 Can. S.C.R. 609; *Sherren v. Pearson* (1887), 14 Can. S.C.R. 581, at p. 583; *Harris v. Mudie* (1882), 7 A.R. 414; *McIntyre v. Thompson* (1901), 1 O.L.R. 163; *Ledyard v. Young* (1914), 7 O.W.N. 146; *Jackson v. Shoonmaker* (1807), 2 Johns. (N.Y.) 230, referred to in *Harris v. Mudie*, 7 A.R. at p. 422.

H. S. White, K.C., for the defendant, respondent, contended that his use of the property for purposes of hunting, trapping, and watering cattle was the only sort of occupation of which it was capable. The fence had been, according to the evidence, kept up reasonably well, considering the nature of the lands. The defendant, therefore, was properly declared to be the owner, having acquired title by possession. Reference to *Babbitt v. Clarke* (1925), ante 60.

May 28. RIDDELL, J.:—This is an appeal from the judgment of my learned brother Logie at the trial, in favour of the defendant.

Stripped of unimportant matters, the case is a fairly simple one.

The plaintiff is the successor in title of grantees from the Crown, in 1801, of a well-known marsh which is being used for hunting purposes. The defendant is the owner of lot 54, concession 5, or at least that part of it which the marsh does not occupy. The lots are rectangular in shape, but the marsh occupies a part of the south-west corner of lot 54. The plaintiff claims that his property extends to the edge of the marsh, the defendant that he has part of this marsh by possession.

With great respect, I think my learned brother placed undue weight upon the existence of a fence; and the greater part of the argument before us was taken up with the discussion of the actuality or otherwise of this fence.

In the decision of this case I am content to accept the finding of the learned trial Judge as to this fence, in connection with the evidence upon which he placed reliance; it is not the enclosure but the occupation of the property which is the determining feature. In very many cases, amongst them *McIntyre v. Thompson*, 1 O.L.R. 163, the occupation or possession which the statute requires in order to give a title adversely to the owner of the paper title has been discussed. *McConaghy v. Denmark*, 4 Can. S.C.R. 609, in the Supreme Court of Canada, is a leading case, and there it is laid down as

App. Div.

1925.

LEDYARD

v.

CHASE.

App. Div. 1925.
LEDYARD
v.
CHASE.
Riddell, J.

undoubted law that possession necessary to bar the title of the true owner must be an actual, constant, visible occupation, by some person or persons, to the exclusion of the true owner, for the full statutory period. *Sherren v. Pearson*, 14 Can. S.C.R. 581, lays down the principle again, and adds that this possession must not be equivocal, occasional, or for a special or temporary purpose.

And, as has been said by Street, J., in *Coffin v. North American Land Co.* (1891), 21 O.R. 80, at p. 87, the tendency has been more than ever in the direction of requiring satisfactory proof of a possession of this character. See also per Osler, J.A., in the *McIntyre* case, 1 O.L.R. at p. 166, and the cases there mentioned.

There was also a case which does not seem to have been reported, but in which I was of counsel, in the Queen's Bench Divisional Court, *Rogers v. Nixon*, in which the facts were more favourable to the possessory title than the present.

The existence of a fence is not occupation at all—it is indeed evidence that such occupation as exists is exclusive, in that a fence is often intended to exclude from the fenced property; but, while it is evidence, it is not conclusive.

The only kind of occupation which is evidenced in this case is the roaming of the cattle over the marsh from time to time, the shooting and trapping of muskrats by the owner of lot 54, and the like. These are mere sporadic acts of trespass, and not acts of possession, properly speaking, at all. In *Rogers v. Nixon* the fence was undoubtedly kept up for many years, the cattle roamed through the wood which was so fenced off, and the claimant from time to time cut cordwood, etc., upon the enclosed territory, but nevertheless the Court held that that was not the kind of possession contemplated by the statute.

It is not without significance that the true owners of the marsh had full use of it for all purposes so that the possession such as it was by the defendant was in any event not exclusive.

But I go upon the absence of proof of possession, and am of opinion that the appeal should be allowed, with costs here and below.

MIDDLETON and SMITH, J.J.A., agreed with RIDDELL, J.

MASTEN, J.A.:—The question for consideration on this appeal is, whether the defendant has acquired a title by possession to some acres of marsh land, the paper title being in the plaintiff. The lands in question are alleged to be valuable as part of the plaintiff's duck shooting preserve.

I agree in the conclusion reached by the other members of the Court, but on a ground slightly different.

The possession necessary to extinguish the paper title must be exclusive of the true owner. Such acts of possession on the part of the trespasser must have only one significance, viz., the exclusion of the true owner from the land in question, and must be incapable of any other explanation.

In the present case the fence (if the construction here described can be called a fence) was built to keep the defendant's cattle from straying, and not with the purpose of excluding the true owner from using these marsh lands for shooting purposes.

Indeed the construction described in the evidence can scarcely be considered even as an interference with the plaintiff's use of the lands for shooting purposes. Much less can it be held to operate to exclude him.

It did not in fact do so. At p. 112 of the evidence, the witness Ledyard says:—

“Q. Have you been up in the particular property we are talking about? A. Yes, I have shot there many times.

“Q. Have you crossed the point at which they shew, and have marked on the plan, that fence existed? A. I would have to get in there.

“Q. How would you go in? A. I would go in a boat.

“Q. In a duck-boat? A. Yes, when the water was right; of course, sometimes the water in these outlying ponds is so low you cannot get a duck-punt in, and when pushing a duck-boat through the marsh you are generally pushing through part water and part loose mud.

“Q. What do you say as to whether or not there was a fence there during the period? A. If there was, I went through it without seeing it.

“Q. What use did you put this property to? A. Shooting.”

It thus appears that the real owner was not in fact excluded by the defendant.

This suffices, in my view, to dispose of the present appeal, which should be allowed with costs and the prayer of the plaintiff's claim granted with costs.

Appeal allowed.

App. Div.

1925.

LEDYARD

v.

CHASE.

Masten, J.A.

[APPELLATE DIVISION.]

1925.

RE CALCUS CO. LTD.

March 11.

May 28.

Bankruptcy—Distress by Landlord upon Chattels of Debtor—Payment of Sales Tax out of Moneys Realised—Claim of Trustee to Balance of Fund — Priorities — Effect of sec. 17 of 12 & 13 Geo. V. ch. 47 (Dom.), Amending Special War Revenue Act, 1915.

In November, 1923, a receiving order was made and the company declared bankrupt; and in January, 1924, the company's landlord distrained for rent and realised from the goods seized a sum of money which was claimed by the trustee in bankruptcy. While a motion by the trustee to compel the landlord to pay over the money was pending, the trustee paid to the Crown a small sum alleged to be due by the company for sales tax:—

Held, that the right of the landlord was not modified by sec. 17 of the Dominion Act (1922) 12 & 13 Geo. V. ch. 47, amending the Special War Revenue Act, 1915.

The effect of the section is to make the trustee's costs, fees, and expenses payable out of the assets of the bankrupt in priority to what is due to the Crown; but the section does not declare nor is it to be inferred that wherever there is a fund out of which the excise tax is payable, the costs, etc., of the trustee are likewise payable out of the fund in priority to all other claims.

An appeal by George F. McGuire from an order of the Registrar in Bankruptcy, dated the 6th December, 1924.

January 22. The appeal was heard by FISHER, J., in Chambers.

R. S. Robertson, K.C., for the appellant.

J. P. Walsh, for the trustee.

March 11. FISHER, J.:—The debtor-company carried on business in the city of Toronto, on premises leased to the company by George F. McGuire.

On the 14th November, 1923, a receiving order was made and the company declared bankrupt. At a meeting of the creditors subsequently held, Humphrey Colquhoun was appointed trustee. On the 28th November, 1923, McGuire, the landlord, filed with the trustee a claim against the estate for \$2,200 for 11 months' rent. On the 31st January, 1924, the landlord made a distress for rent. It is alleged that on the 7th December, 1923, the Crown filed a claim with the trustee claiming the sum of \$7.10 as excise tax. After the landlord had seized the goods and chattels of the company, the trustee, by letter dated the 31st January, 1924, marked as exhibit A to the trustee's affidavit, wrote to the bailiff of the landlord the following letter:—

"Re Calcus Co. Ltd. estate. We understand that you are mak-

ing sale to-day, on behalf of the landlord, of the machinery and equipment which comprise the assets of the above estate. Whilst we do not approve of the action of the landlord nor do we admit that he has the right to make sale, we would like to say that any moneys realised in excess of the claim of the landlord should be accounted for to us. In any event we would like you to be good enough to let us have a statement of the moneys realised on the sale, whether or not the same is in excess of the landlord's claim. Thanking you for your attention in this matter, yours truly, Humphrey Colquhoun."

Fisher, J.
1925.

RE CALOUS
CO. LTD.

After the trustee was appointed by the creditors, he had an inventory of the stock taken, the machinery valued, and the property insured.

The landlord realised from the sale of the assets seized \$1,746.61, leaving a balance owing to him of about \$450. The trustee notified the landlord to hand over the money to him, and he refused.

In May, 1924, the trustee launched a motion, returnable before the learned Registrar, to compel the landlord to hand over the money to him. This motion was enlarged from time to time for one reason or another, and on the 6th December the Registrar directed that the landlord hand over the moneys to the trustee.

In the month of September, when the motion was pending and before the motion was disposed of, the landlord paid the Crown's claim for taxes. This appeal is from the Registrar's order.

Counsel for the landlord contends: (1) that this is a matter outside of the Bankruptcy Court and that there is no jurisdiction to hear it; (2) that there is no satisfactory evidence proving when the claim of the Crown for excise tax accrued; and (3) that it is only in cases where the trustee has realised on the estate and is distributing the proceeds that he is entitled under sec. 17 of the Dominion Act (1922) 12 & 13 Geo. V. ch. 47, amending the Special War Revenue Act, 1915, to priority for his costs and expenses in connection with the administration of the estate, because the legislation was intended to apply only to cases where the trustee had the expense and labour of realising the assets.

Upon a receiving order being made, and a trustee appointed by the creditors, the debtor's property vests in the trustee, subject to the rights of secured creditors. See sec. 6 (3) of the Bankruptcy Act. This section states that the property shall, until the appointment of the trustee, be deemed to be in the custody of the Court. Under sec. 17 (1), a trustee is entitled to possession of the debtor's property, and (2) is in the same position as a receiver appointed by the Court, and the Court may, on the trustee's application, en-

Fisher, J. force acquisition or retention of the debtor's property. The distribution by the trustee of an insolvent estate, under sec. 51, is subject to sec. 52, and under that section the landlord is entitled to whatever rights the law of the Province gives him. The law of this Province applicable at the time the landlord seized and sold is to be found in sec. 38 (1) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155. By this section the landlord's preferential lien for rent is restricted to the arrears of rent during a period of one year preceding and for three months following the declared insolvency of the tenant.

1925.
RE CALCUS
Co. LTD.

Section 17 of the Act of 1922, amending the Special War Revenue Act, 1915, has been interpreted in many decisions. See *Attorney-General for Canada v. Gordon* (1924), 56 O.L.R. 48. This was a case where the Crown had a claim for war revenue tax against the tenant, and a bailiff acting on behalf of the landlord seized and sold the assets. Wright, J., held that the Crown was entitled to its claim in priority to the claim of the landlord. The tenant in that case was not in bankruptcy. And see also *Re Davis* (1924), 26 O. W. N. 426, 4 C. B. R. 698, a decision of my own. The conclusion arrived at in that case was that the judicial costs, fees, and lawful expenses of the trustee were a first charge on the assets of the debtor (not subject to the rights of secured creditors), because the Crown had filed a claim for excise tax, and that the Crown was entitled to be paid after the trustee's costs, etc., and then the landlord was entitled.

Section 17 refers to the "judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets." The officer charged in this case with the administration of the estate is undoubtedly the trustee of the insolvent company; but the learned counsel for the landlord strongly urged that, as the trustee had not in fact done work or incurred expense in connection with the realisation of these particular assets out of which the Crown's claim was payable, Parliament did not intend, and sec. 17 does not mean, that in such an event the trustee is to be entitled to a first charge on the assets of the estate for his judicial costs, fees, and lawful expenses.

In *Re Auto Experts Ltd.* (1921), 49 O. L. R. 256, 1 C. B. R. 421, Orde, J., said: "Section 52 of our Bankruptcy Act," now repealed, "deprives the landlord of his right to distrain even to the extent of requiring him to relinquish goods upon which he has distrained to the trustee."

The Act of 1923 gives no right of distress, neither does sec. 38 (1) of R. S. O. 1914, ch. 155; and, as the property is in the

custody of the law without the consent of the trustee, the landlord is debarred from distraining.

The landlord is in the position of a preferred creditor, and the trustee is bound to recognise him as such in the distribution of the estate. In the present case the evidence is not sufficiently clear for me to hold that the trustee abandoned the insolvent estate to the landlord and authorised him to seize and sell. It is alleged that the solicitors then acting for the trustee sent the key of the premises to the landlord, but it was not shewn for what purpose.

It appears to me that the landlord took the matter into his own hands and authorised his bailiff to seize and sell. The landlord must be held to have known that a trustee in bankruptcy was bound in the distribution of the estate to pay him the amount of rent for which he had a preferential lien—a lien which arose only upon the making of the receiving order—in so far as the assets would permit; and, whilst there is no evidence that the trustee took any effective steps to oppose the seizure and sale, he did notify the bailiff after seizure and before sale (see the letter of the 31st January, 1923, *supra*) that he did not approve of the landlord making a sale and that he required the money and a statement of all moneys in excess of the rent. It is evident that at this time the trustee did not know what his exact legal rights were, as defined by sec. 17, when a claim had been filed by the Crown with him; but thereafter, upon being advised, insisted on the landlord handing over to him the money realised, for distribution.

The material on file shews that the trustee received the Crown's claim on the 7th December, 1923, about three weeks before the landlord seized. Now that the Crown's claim has been paid, it does not seem reasonable to ask the landlord to pay the money over, as the result would be that the trustee would have to repay it to the landlord, there being no other debts entitled to be paid in priority to the landlord's, unless it is the trustee's costs, expenses, etc. There is no doubt, too, that if the claim of the Crown had not been filed the trustee would not now be asking for this money; but the question is, is the trustee, being an officer of the Court and vested with the insolvent's estate under the receiving order, within his strict legal rights in so doing? The trustee after he was appointed gave a bond as required by sec. 14 of the Act and called meetings of creditors; inspectors were appointed, the property was insured by him as required by sec. 17 (3), he made an inventory of the property and had it valued, and also realised the sum of \$30 on one machine sold. The trustee incurred considerable disbursements in so doing. In his statement filed he charges \$20 for bond, fees paid to official receiver, filing

Fisher, J.

1925.

RE CALCUS
CO. LTD.

Fisher, J.
1925.
RE CALCUS
Co. LTD.

bonds, etc., \$11.15, advertising \$19.10, paid for valuing machinery \$10, insurance \$94.24, and general expenses, postage, registration, etc., \$57.60; and, unless the landlord is compelled to hand over the moneys in question for distribution by the trustee under the Act, he will be out all these disbursements. But, on the other hand, it would be a hardship on the landlord to be obliged to suffer a substantial reduction in his rent, simply because of a claim made by the Crown amounting to \$7.10. I cannot allow the result to affect my judgment, but at the same time were not both parties to this litigation to blame? The trustee should have insisted on his legal rights and restrained the landlord. The statutory right of a trustee to administer a bankrupt estate vested in him under an order of the Court is, in my opinion, paramount to that of a landlord's right to realise by distress his preferential lien. A trustee cannot be divested of an estate except by an order of the Court, and I must hold that the landlord by seizing and selling did not divest the trustee of the proceeds, but that the effect was to constitute him an agent and a volunteer to do something which the trustee was bound and entitled to do. No doubt, the payment by the landlord of the Crown's claim, in September and before the motion was heard, was an attempt to strengthen his position on the pending motion. I do not see what other order the learned Registrar could have made, on the material before him, than the one he did.

This, being an application by the trustee to recover assets of the estate from one who has improperly taken them out of his possession, is clearly within the bankruptcy jurisdiction of the Court.

In view of the fact that the trustee did not take a definite stand when the landlord seized and sold, I shall deprive him of all costs in connection with the motion and the appeal.

McGuire, the landlord, appealed from the order of FISHER, J.

May 26. The appeal was heard by RIDDELL, J., MIDDLETON, MASTEN, and SMITH, JJ.A.

R. S. Robertson, K.C., for the appellant, contended that the purpose of sec. 17 of the Dominion Act of 1922 was not to secure a priority to the assignee for his fees, costs, and expenses in and about the estate over a claim such as that of the debtor's landlord for rent, but to provide for payment of revenue to the Crown. Reference to *Attorney-General for Canada v. Gordon* (1924), 56 O.L.R. 48; *Re Davis*, 26 O.W.N. 426, 4 C.B.R. 698; the Bankruptcy Act, sec. 52, as enacted by 13 & 14 Geo. V. ch. 31, sec. 31; *Alderson*

v. *Watson* (1916), 35 O.L.R. 564, 36 O.L.R. 502; *Eacrett v. Kent* (1887), 15 O.R. 9; *Re Fashion Shop Co.* (1915), 33 O.L.R. 253.

App. Div.
1925.

J. P. Walsh, for the trustee in bankruptcy and for the Crown, respondents, relied upon the section of the Act in question and upon the *Gordon* case, cited by counsel for the appellant.

RE CALCUS
Co. LTD.

May 28. The judgment of the Court was read by RIDDELL, J.:—The facts in this case are exceedingly simple. McGuire, the landlord of a bankrupt, having taken a chattel mortgage for some \$1,600 for overdue rent, and this, as well as further rent, remaining unpaid, seized for rent in January and realised \$1,746. This seizure was made with the knowledge and at least the tacit consent of the assignee, but I do not conceive that the assignee is thereby barred from any claim which he otherwise would have. It turned out, however, that there was unpaid a sum of \$7.10 for sales tax, and the assignee endeavoured to take advantage of what he believed to be the effect of sec. 17 of the Dominion Act of 1922, 12 & 13 Geo. V. ch. 47, which reads as follows:—

“Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm or corporation, for payment of the excise taxes specified in the Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.”

The assignee argues that this gives priority to him in respect of his fees, etc., over the landlord; and effect has been given to this argument by the learned referee and my brother Fisher.

I cannot think that this is the effect of this section: the argument seems to be based upon the hypothesis that law is logic, and that if proposition B logically follows from proposition A then when proposition A is established as law proposition B is likewise law—but this is not the case. Law is not mathematics and it is not logic: *Quinn v. Leathem*, [1901] A.C. 495, at p. 506.

The whole effect of this statute is to provide that if there is a fund out of which the excise tax and the costs, etc., of the assignee are payable, the country waives its right to the excise tax in favour of the assignee; that statute does not provide that, wherever there is a fund out of which the excise tax is payable, then the costs, etc., of the assignee are likewise payable in priority or otherwise howsoever.

App. Div. I see nothing in this statute modifying in any way what are
 1925. the undoubted rights of a landlord. These rights are admitted by
 Mr. Walsh, and do not require to be restated.
 RE CALCUS As I think the statute has been misinterpreted, I would allow
 Co. LTD. the appeal with costs here and below to be paid by the trustee.
 Riddell, J.

Appeal allowed.

[RIDDELL, J.]

1925.
 June 2.

SEYMOUR V. PRATT.

Executor and Trustee—Payment of Legacies—Discretion Given by Will as to Times of Payment and Withholding Payment—Discretion Unreasonably Exercised—Violation of Directions of Will—Powers of Executor where two Named in Will and Probate Granted to one only — Action for Legacy — Declaration that Legacy Improperly Withheld—Administration Order—Parties—Practice—Rule 608.

The testatrix by her will appointed her husband and her solicitor executors; the solicitor renounced, and letters probate were granted to the husband alone. She directed her executors to pay her debts and funeral and testamentary expenses, and then made bequests of sums of money to two charitable institutions, each payable in ten annual instalments without interest. Then followed a bequest of a sum of money to A., "to be paid as soon as the finances of my estate will permit." Next was a bequest (para. 5) to the plaintiff of \$300 per annum during his lifetime, "to be paid as soon as the finances of my estate will permit my executors to do so." By para. 7, she directed that "it shall not be incumbent to pay any bequest until three years after my decease and in no case shall interest be paid on any bequest . . . and my husband . . . during his lifetime and any other executors after his death shall decide when said amounts shall be paid and in what amounts from time to time." By paras. 8 and 9 she made a specific bequest to her husband of her shares in an incorporated company and also gave him one-third of her general estate. The remainder of her estate (para. 10) she bequeathed to her granddaughter, directing her husband, during the minority of the granddaughter and for so long as he should think advisable to fix the amount that should be paid to the granddaughter per month. The granddaughter was not to have the principal but to be paid the income only during her lifetime; and the disposition of the corpus was provided for by paras. 10 and 11. By para. 12 and last, the testatrix authorised her executors "at any time to withhold any payment of legacy or bequest . . . until such time as they may consider it advisable to make same." The testatrix died in 1917; the husband took possession of the estate; he paid none of the specific legacies; but paid over all the income of the estate to the granddaughter in each year from 1917 up to the time when this action was brought against the executor. It was not pretended that the finances of the estate would not permit the executor to pay the plaintiff's legacy:—

Held, that nothing in paras. 5 and 7 authorised the defendant to withhold payment of the plaintiff's legacy; and the discretion given by para. 12—if it could be exercised by one of two executors named—did not put the defendant in a position to say that he would pay money to the residuary legatee and not to the legatee entitled in priority to her, i.e., to violate deliberately the terms of the will.

The discretion was one to be reasonably exercised.

Unless the parties agreed, there should be an order for administration. The making of such an order is discretionary; and it is not necessary that all the persons interested in the estate shall be before the Court as parties.

Rule 608 and *Re Sievert* (1921), 51 O.L.R. 305, referred to.

ACTION by a legatee under the will of the deceased wife of the defendant to recover from the defendant the amount of the legacy, for administration of the estate of the deceased, and for other relief.

The action was tried by RIDDELL, J., without a jury, at Hamilton.

D. L. McCarthy, K.C., and *T. B. McQuesten*, for the plaintiff.
The Hon. George Lynch-Staunton, K.C., for the defendant.

June 2. RIDDELL, J.:—The facts in this case are very simple; and the somewhat unusual has occurred, in that the plaintiff accepts the evidence of the defendant upon his examination for discovery as his (the plaintiff's) evidence in the case, and the defendant does not wish to supplement it, so that I am to take the examination for discovery as being the evidence on the trial.

The late Mrs. Pratt, of Hamilton, died in February, 1917, leaving her last will and testament, dated the 8th February, 1917, in which she appointed her husband, the defendant, and her solicitor, executors and trustees of her will during the lifetime of her husband. The solicitor renounced probate (as he also generously renounced a bequest of \$1,000 to him contained in the will), and the husband alone took out letters of probate.

The said will provides for the payment of debts and funeral and testamentary expenses by the executors; then it makes a bequest of \$5,000 to the Boys' Home, payable in ten annual instalments without interest.

3. Bequest to the Day Nursery of the sum of \$3,000, payable in ten annual instalments without interest.

4. Bequest of \$5,000 to Albert Vail Seymour, of New York, such \$5,000 "to be paid as soon as the finances of my estate will permit my executors to do so, during his lifetime . . ."

Then comes the paragraph which gives rise to the litigation—it reads as follows:—

1925.
SEYMOUR
v.
PRATT.

Riddell, J.
1925.
SEYMOUR
v.
PRATT.

"5. I give and bequeath to Clarence B. Seymour, of Kansas, Mo., the sum of three hundred dollars (\$300.00) per annum during his lifetime, same to be paid as soon as the finances of my estate will permit my executors to do so."

Paragraph 7 reads as follows:—

"7. I direct that it shall not be incumbent to pay any bequest until three years after my decease, and in no case shall interest be paid on any bequest that I now make, and my husband Thomas Henry Pratt during his lifetime and any other executors after his death shall decide when said amounts shall be paid and in what amounts from time to time, this to include the bequests to all persons."

The 8th is a specific bequest to the husband of her stock in the T. H. Pratt Company Limited, "which shall not be considered as part of my general estate."

The 9th reads as follows:—

"9. I give one-third of my general estate outside the T. H. Pratt Company Limited to my husband Thomas Henry Pratt."

Then comes the residuary devise and bequest as follows:—

"10. The remainder of my estate I give devise and bequeath to my granddaughter Ottilie Vail Birge of the city of Hamilton, subject to the following conditions:—

"I direct that my husband shall give her all my jewellery at her marriage or when she becomes twenty-one years of age, and during the minority of the said Ottilie Vail Birge and for as long as my husband shall think advisable he shall fix the amount that shall be paid to the said Ottilie Vail Birge, per month. The said Ottilie Vail Birge shall not have the principal of my estate but shall only be paid the income therefrom during her lifetime, and at her death the whole of the said principal shall go to her lawful issue, after the death of my husband, if any, and in case she should die leaving no lawful issue, after the death of my husband, I direct that three-quarters of my estate then remaining shall be given to the Boys Home on Stinson street, one-eighth to the Day Nursery in the city of Hamilton and one-eighth to the children of Albert Vail Seymour of New York City if then living but in case they should be then dead the said one-eighth shall go to the Boys Home in this city.

"11. In case of the death of the said Ottilie Vail Birge previous to that of my husband Thomas Henry Pratt all the residue of my estate devised to the said Ottilie Vail Birge shall revert to and go to the said Thomas Henry Pratt during his lifetime, and at his death such share shall be distributed as by paragraph 10 it is provided."

Then paragraph 12 and last reads:—

“12. I hereby direct that my executors shall have full power to sell or mortgage my real estate and to give good and sufficient conveyances or mortgage to carry out a sale or mortgage. Such sale or mortgage to be on such terms as they in their discretion deem proper. I also give my executors power to change any of my investments or continue any investments as I may have at my decease in the form they are at present. My executors are hereby specially authorised at any time to withhold any payment of legacy or bequest herein made, until such time as they may consider it advisable to make same.”

The husband, after taking out letters of probate, took possession of the estate and took the fifty shares left to him by the eighth paragraph of the will. The rest of the property, with the exception of trifling personalty which need not be mentioned, consisted of two pieces of real estate, one on King street, which for the purpose of probate was valued at \$50,000, and one known as Hampton Court, which for the purpose of probate was valued at \$35,000. None of the specific legacies has been paid, but every dollar—as the defendant puts it “every dime”—has been paid by the executor to the residuary legatee, the granddaughter, now Mrs. McKay. Statements rendered during the course of the action shew, for example, that in 1921 from the Hampton Court property there was a net balance of \$3,837, of which two-thirds were given to Mrs. McKay, and the defendant retained for himself \$1,279. For the King street property the net balance was \$1,189 for the same year, of which Mrs. McKay was given \$794 and the defendant received \$379. The same sort of proceeding was had in each of the years. The defendant seems to be infatuated with Mrs. McKay, as he says any money which is his is hers, and that she received every dollar of what he is credited with receiving.

In other words, the executor has taken upon himself to administer the estate of which he is a trustee in total disregard of the bequests which are first mentioned, and has given to the residuary legatee the whole of the proceeds of the estate. At the trial this was attempted to be justified by the provisions of paras. 5, 7, and 12.

As regards para. 5, there is no pretence that the finances of the estate would not permit the executor to pay the legatee who is the plaintiff in this action, and it is clear that his only reason for not paying it, if it can be called a reason, is that he thought he could give the preference to his granddaughter Mrs. McKay.

As regards the last clause of para. 12, which is appealed to, that gives the executors a discretion to a certain extent—that is, to

Riddell, J.

1925.

SEYMOUR
v.
PRATT.

Riddell, J. withhold the payment of a legacy until such time as they consider it advisable to make it—but that does not authorise the defendant to violate deliberately the terms of the will itself.

1925.

SEYMOUR
v.
PRATT.

Assuming, without deciding, that one executor can exercise the discretion which is given to the two named persons, this is a discretion which is to be reasonably exercised, not simply a whim or a caprice or a feeling of affection for one legatee rather than the other. As was said hundreds of years ago, “discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections: for as one saith, *talis discretio discretionem confundit*.” *Rooke’s Case* (1598), 5 Co. R. 99b., at p. 100a. Or, as it is put by Lord Kenyon in *Wilson v. Rastall* (1792), 4 T.R. 753, at p. 757: the discretion is “to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself.”

In the case of *Re Atkins* (1899), 81 L.T.R. 421, in discussing a direction to trustees to sell at their absolute discretion, North, J., says:—

“A direction given to trustees to sell at their absolute discretion is not equivalent to a direction that trustees may sell or not at their absolute discretion.”

Putting that in other words, a direction given to pay is not to be disregarded and counted as nothing because the direction is to pay at discretion. It is quite clear that nothing in paras. 5 and 7 has the slightest effect here; and I am of opinion that the discretion given by the last clause of para. 12 does not entitle this executor to say that he will pay money to the residuary legatee and not to the legatee who is entitled in priority to her.

It is probable that a declaration to such effect will be effective; but, if not, I think this legatee is entitled to a decree for the administration of the estate:—it would be intolerable to allow the property to remain in the hands of a person who has such a conception of his duties and powers.

I offered to make an order for administration at the trial, but it was objected to upon several grounds. In the first place, it was said that an order for administration could not be made without making all the persons interested parties. I do not think that the power of the Court is so limited. Our Rule 608 shews that any legatee may apply, even by originating notice, for the administration of the estate, and it has been held that it is a matter for the sound discretion of the Court whether to grant administration or

not. Formerly it was as of right, but by the change made not long ago in our Rules that is no longer the case—the rule is as laid down in *Re Sievert* (1921), 51 O.L.R. 305, 67 D.L.R. 199, and other cases. In the present case it is quite obvious that the executor has no intention of doing anything but paying all the revenues of the estate as they come to his hands to the residuary legatee, to the detriment of the specific legatee, the plaintiff, and others in the same interest: this could not be tolerated.

Unless the parties agree otherwise, there will be judgment declaring that the defendant is not justified in retaining or paying over to the residuary legatee the receipts of the estate, and an order for administration. The defendant will pay the costs up to and including judgment; costs of administration, if administration be required, will be disposed of by the Master.

Riddell, J.

1925.

SEYMOUR
v.

PEATT.

[MEREDITH, C.J.C.P.]

RE SEXSMITH.

1925.

June 4.

Will—Construction—Benefits Given to Widow—Whether in Lieu of Dower—Election—Life Insurance—Change of Beneficiary within Preferred Class—Ontario Insurance Act, secs. 171(3), 178(2), 179.

Under the will of S., his widow took absolutely 34 acres devised to her, worth about \$1,000; she also took, for life, his "house and lot and garden," worth about \$1,500, but took them subject to a son's and a daughter's right "to have a home" there "as long as they are single." And the son took absolutely the rest of the testator's land, worth about \$3,500; and at the widow's death took "the house and lot and garden" also:—

Held, that the widow was not put to her election and was entitled to dower out of the parcel of land that the son took immediately.

The testator's wife was the beneficiary of \$1,000 payable by a friendly society upon his death; but in his will he gave that to his son "to enable him to pay my just debts and expenses." By the will the executors and trustees were "to first pay my just debts, funeral and testamentary expenses." The son was the sole executor, another named in the will having renounced:—

Held, that the change of beneficiary, from wife to son, was not invalid by reason of sec. 171 (3) or sec. 178 (2) of the Ontario Insurance Act—it was a variation from one to another of the same preferred class under sec. 179.

MOTION by the son and executor of the will of George Albert Sexsmith, deceased, for an order determining certain questions as to the meaning and effect of the will.

1925.

RE

SEXSMITH.

June 1. The motion was heard in the Weekly Court, Toronto. *G. H. Pettit*, for the executor.

H. A. Rose, for Ada M. Sexsmith, the widow.

Lyle Ramsey, for the Official Guardian, representing Ruth Sexsmith, the infant daughter of the testator.

The adult daughters of the testator were notified, but did not appear.

June 4. MEREDITH, C.J.C.P.:—That which the testator thought should happen, in his family affairs after his death, under his will, seems to me to be made plain, generally, by that which he wrote in his will, and the evidential circumstances affecting it: and that is: that the family affairs should be continued after his death as they were carried on in his lifetime, his son taking his place.

The gifts which he made, and the provisions for distribution in case of a sale, are consistent with that, and, as it seems to me, with that only.

But he has not sufficiently provided for all that in his will; and effect cannot be given to that which he thought: it can be only to that which he said.

Under the will the widow takes absolutely the 34 acres devised to her — worth about \$1,000; and she takes also, for life, “the house and lot and garden,”—worth about \$1,500; but takes them subject to a son’s and a daughter’s right “to have a home” there “as long as they are single.”

And the son takes absolutely the rest of the testator’s land, worth about \$3,500; and, at the widow’s death, takes “the house and lot and garden” also.

It is more than likely that the testator did not contemplate the widow having dower also in the land that his son took immediately; but he has not said enough to put her to an election; therefore she cannot be deprived of dower in addition to that which she takes under the will; but it seems unlikely that she shall take that view of the matter, doubtless knowing what her husband really meant: it is quite likely that the question is only a lawyer’s one.

The testator’s wife was the “beneficiary” of \$1,000, payable by a friendly society upon his death; but, in his will, he gave that to his son “to enable him to pay my just debts and expenses.” Under the will the testator’s “executors and trustees” are “to first pay my just debts, funeral and testamentary expenses.”

The son is the sole executor, the other, named in the will, having renounced.

The Ontario Insurance Act—sec. 171 (3)—prevents the “as-

sured" from altering or diverting "the benefit of a person who is of the class of preferred beneficiaries to a person not of that class or to the assured himself or to his estate;" and in sec. 178 (2) provides that "where the contract of insurance or declaration provides that the insurance money shall be for the benefit of a preferred beneficiary. . . . such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration."

Is the change of beneficiaries, from wife to son, invalid by reason of either of these provisions of the Act?

My answer is: No. It is not literally within either prohibition. It is a variation from one to another of the same class under sec. 179.*

The reason for taking from the wife and giving to the son the \$1,000 was stated to be, that he was to pay the debts and expenses, and at the same time—in the same writing—she was given other valuable property.

I have said that literally the scheme of the will was not an invasion of the Act; nor is it contrary to its "spirit."

The purpose of the prohibition is the prevention of deprivations of the preferred class: there is, substantially, none such here: the widow gets more; and the son gets this, in an equalisation of the testator's gifts; for the reason that he is to pay debts.

It is not to be forgotten that he is in the preferred class—in the highest rank of that class, a son—and if deprived of this money shall be done a wrong—which the widow cannot, and probably does not attempt to, deny.

This, too, is doubtless a lawyer's question. The widow knows her husband's will and is not likely to desire to disrupt his final arrangement and distribution of the estate.

* 179.—(1) The assured may by a declaration vary a contract or declaration previously made so as to restrict, extend, transfer or limit the benefits of the insurance to any one or more persons of the class of preferred beneficiaries to the exclusion of any or all others of the class. . . . but the assured shall not except as provided by subsection 7 of section 178 revoke or alter any disposition made under the provisions of this Act in favour of any one or more of the preferred class except in favour of some one or more persons within the preferred class so long as any of the persons of the preferred class in whose favour the contract or declaration is made are living.

Meredith,
C.J.C.P.

1925.

RE
SEXSMITH.

Meredith,
C.J.C.P.

1925.

RE
SEXSMITH.

The clause in the will respecting the sale of the farm can take effect only according to the consent of the parties; and no one is obliged, in law, to consent. The Court has no power as to this.

An order may go accordingly; but not against any one who was not represented upon the motion, because the notice of motion served did not cover all the matters argued and now adjudicated upon. Those not present must consent, or be given an opportunity to be heard on all matters, before they can be bound.

[APPELLATE DIVISION.]

1925.

WOJCIK V. ANTHES FOUNDRY CO. LTD.

June 4.

Insurance (Life)—Policy Issued to Employer upon Lives of Employees—Designation of Wife of Employee as Beneficiary—Preferred Beneficiary—Cesser of Employment—Notification to Insurance Company—Terms of Policy.

APPEAL by the plaintiff from the judgment of RIDDELL, J., 56 O.L.R. 600.

June 4. The appeal was heard by LATCHFORD, C.J., MIDDLETON and MASTEN, JJ.A., and WRIGHT, J.

C. M. Garvey, for the appellant.

Samuel Rogers, for the defendant foundry company, and *R. D. Moorhead*, for the defendant assurance company, respondents, were not called upon.

At the conclusion of the argument for the appellant, LATCHFORD, C.J., said that all the members of the Court were of opinion that the judgment appealed from was right. The deceased having ceased to be employed by the foundry company, and the assurance company having been duly notified of the fact, the deceased's re-entry afterwards into the employment of the foundry company did not bring him within the terms of the policy.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

ALLEN v. PATTERSON.

1925.

June 5.

Sale of Goods—Bulk Sales Act, 7 Geo. V. ch. 33—Sale by Farmer of Chattels on Farm—Whether Act Applicable—Effect of Non-compliance with Requirements of Act—Sale not Attacked within 60 Days—Action by Trustee in Bankruptcy of Vendor's Estate for Price of Goods—Set-off by Purchaser of Debt Due by Vendor—Sale not Invalid under Bankruptcy Act.

Non-compliance with the requirements of the Bulk Sales Act, 7 Geo. V. ch. 33, has the effect of rendering a sale of goods in bulk void as against creditors if the transaction is attacked within 60 days from the date of sale; but this is the only penalty for non-compliance; and, where the transaction is not attacked within the 60 days, the transaction stands as though the Act had not been passed.

Sections 4, 5, 6, and 9 of the Act considered.

In an action brought against the purchaser for the balance of the price of the goods sold, by A., who had been appointed trustee under the Bulk Sales Act, and who was also the trustee in bankruptcy of the estate of the vendor, it was *held*, that the purchaser was entitled to set off a sum admittedly due to him by the vendor.

No case was made for invalidating the transaction as a preference under the Bankruptcy Act.

The question whether the Bulk Sales Act applied to a sale by a farmer of his live stock and equipment was expressly left undetermined; doubt being expressed as to whether *Worthington v. Robbins and Cadigan* (1924), 56 O.L.R. 285, was well decided.

APPEAL by the defendant from the judgment of the 10th Division Court of the County of York (MORSON, Jun.Co.C.J.) in favour of the plaintiff in a plaint for the recovery of \$160, the balance of the purchase-price of certain articles sold in the circumstances set out below.

May 6. The appeal was heard by LATCHFORD, C.J., MIDDLETON, J.A., LENNOX, J., and ORDE, J.A.

W. W. McLaughlin, for the appellant.

E. A. Harris, for the plaintiff, respondent.

June 5. MIDDLETON, J.A.:—The facts are not in dispute. One James Henderson, a farmer in the township of Scarborough, advertised his farm-property, consisting of cattle, farm implements, and miscellaneous articles, for sale by public auction on Saturday the 13th October, 1923. He was at that time indebted to the defendant and to many others; and on the 11th October one of the creditors issued a writ in the County Court claiming an injunction against Henderson and the auctioneer to restrain the sale as in

App. Div.
1925.
ALLEN
v.
PATTERSON.
Middleton,
J.A.

violation of the Bulk Sales Act, and an order was at once made on the 12th October appointing Mr. McLaughlin trustee under the provisions of the Bulk Sales Act and directing that the moneys and proceeds of sale be paid and transferred to McLaughlin as such trustee. The sale thereupon proceeded, and the defendant bought goods at the sale, the price of which amounted in the aggregate to \$237.75. This sum the defendant claims to be entitled to set off *pro tanto* against an admitted indebtedness by Henderson to him of \$360. On the 5th December, 1923, Eleridge, the creditor at whose instance the trustee was appointed, recovered judgment against Henderson for the sum of \$748, but no seizure of the goods in question has been made under any execution. On the 23rd April, 1924, Henderson was adjudged bankrupt, and the plaintiff in these proceedings, Elliott Allen, was appointed trustee in bankruptcy on the 30th September, 1924. An order was made by the County Court Judge appointing Allen trustee under the Bulk Sales Act, in the place of McLaughlin, and directing McLaughlin to transfer all assets received by him, under the order appointing him, to the plaintiff. On the 11th December, 1924, Allen issued a summons in the Division Court claiming to recover from Patterson \$160 as a balance due with respect to the goods purchased by Patterson.

The only question argued in the Division Court or upon this appeal is the right of the defendant to set off the amount due by Henderson against the purchase-price. There is some discrepancy in the amount, but this was not the subject of any discussion. The learned Division Court Judge denied the right of set-off, stating, "It would in effect be giving the defendant preference."

Although the amount involved is not large, the questions raised are of importance and difficulty. I pass over without discussion the question as to the applicability of the Bulk Sales Act, 7 Geo. V. ch. 33, to farmers. Mr. Justice Riddell in *Worthington v. Robbins and Cadigan* (1924), 56 O.L.R. 285, determined that the Act applies to a sale by a farmer of his live stock and equipment. It appears to me that much may be said against this view, and I desire to leave the question unaffected by this judgment.

The case can, I think, be determined by a consideration of the terms of the statute itself. Put shortly, any one who purchases any stock in bulk is called upon (sec. 4) to demand and receive a written statement, verified by statutory declaration, as to the creditors of the vendor; and if the purchaser pays any portion of the purchase-price without having obtained this declaration, the sale shall be fraudulent and void as against the creditors of the vendor.

Upon the statement being furnished, the purchaser shall (sec. 5) pay his purchase-money into the hands of a trustee for distribution *pro ratâ* among the creditors. If he fails to make the payment to the trustee, then the sale is to be deemed fraudulent and void (sec. 6); but no action may be brought or proceedings had to declare the transaction void for failure to comply with the provisions of the Act unless the action is brought within 60 days from the date of sale (sec. 9).

It seems to me that non-compliance with the requirements of the Act has the effect of rendering the transaction liable to be declared void as against the creditors if attacked within the statutory period. This is the only penalty for the violation of the requirements of the Act; and, no attack having been here made upon the sale in question within the time limited, the transaction stands as though the Act had not been passed. It follows that the right to set-off exists.

If the transaction is sought to be attacked by the plaintiff in his capacity of trustee in bankruptcy, no case is made. The sale took place on the 13th October. Bankruptcy did not take place until the 23rd of the following April. There is nothing shewn to invalidate the transaction.

The appeal should be allowed and there should be judgment dismissing the action with costs.

LATCHFORD, C.J., and LENNOX, J., agreed with MIDDLETON, J.A.

ORDE, J.A., agreed in the result.

Appeal allowed.

App. Div.
1925.
—
ALLEN
v.
PATTERSON.
—
Middleton,
J.A.

[APPELLATE DIVISION.]

1925.

RE HAZELL.

June 5.

Dower—Inchoate Right—Whether Defeated by Conveyance to Uses—Mortgage Made by Grantee to Uses—Power of Appointment not Exhausted—Further Exercise of Power by Conveyance of Equity—Effect of Second Conveyance to Uses—Registration of Discharge of Mortgage—Effect of—Conveyance in Fee Simple Barred of Entail—Registry Act, sec. 67—Feigned Issue.

The decision of LOGIE, J., *ante* 166, was affirmed on all points but one. *Held*, that M., the first appointee, by executing a mortgage by way of appointment to V. did not exhaust his power, but had the right further to appoint the equity of redemption.

(2) That M., by the execution of a conveyance of the equity to B., in the exercise of the power, defeated any right to dower that might exist in M.'s wife: the estate and the power may co-exist in the same individual.

Review of the authorities.

Ray v. Pung (1822), 5 B. & Ald. 561, followed.

(3) The effect of the second conveyance to uses was as stated by LOGIE, J.

(4) The effect of the registration of the discharge of the V. mortgage was not to reconvey to B. "the original estate of the mortgagor in the lands," as declared by LOGIE, J., but the fee simple in the land barred of the entail.

The Registry Act, R.S.O. 1914, ch. 124, sec. 67, and *Lawlor v. Lawlor* (1882), 10 Can. S.C.R. 194, referred to.

Semble, that a feigned application intended to prejudice the rights of other litigants is a contempt of court.

Brewster v. Kitchin (1698), Comberbach 424, referred to.

APPEALS by Lillian W. Marshall and Ethel D. Brown from the order of LOGIE, J., *ante* 166.

May 7. The appeals were heard by LATCHFORD, C.J., MIDDLETON, J.A., LENNOX, J., and ORDE, J.A.

H. A. Burbidge, for the appellant Marshall.

H. E. B. Coyne, for the appellant Brown.

George C. Thomson, for William Hazell, respondent.

The following authorities were referred to: the Dower Act, R.S.O. 1914, ch. 70, sec. 2; *Goodill v. Brigham* (1798), 1 B. & P. 192, 196; *Buckworth v. Thirkell* (1785), 3 B. & P. 652, note; *Ray v. Pung* (1822), 5 B. & Ald. 561, 563; *Maundrell v. Maundrell* (1805), 10 Ves. 246; Gilbert on Uses and Trusts, 3rd ed. (1811), p. 351; Halsbury's Laws of England, vol. 23, p. 25, para. 53.

June 5. MIDDLETON, J.A.:—Appeal from an order of Mr. Justice Logie bearing date the 8th April, 1925, *ante* 166, dealing

with certain questions raised upon an originating notice under Rule 603. App. Div.

The facts are fully set forth in the judgment in review, and need not be here repeated. 1925.
RE HAZELL.

Middleton,
J.A.

Upon this appeal the first question raised is, did Marshall, by executing the mortgage to Vila, appoint the property and exhaust the right further to appoint his equity, as he purported to do in the deed to Brown? The answer of the learned Judge is clearly right. There is no room to doubt the accuracy of the law as summed up in Halsbury's Laws of England, vol. 23, p. 25, that there is an unquestionable right to exercise a power of appointment by way of mortgage—the extent to which such an appointment operates depending entirely upon the intention to be collected from the deed taken as a whole—and that, if no indication of intention exists, there is a presumption that nothing more than the mortgage was meant.

The document in question was intended to operate as a mortgage, but as nothing more.

The second question raised is, whether Marshall, by the execution of the conveyance to Brown in exercise of the power, defeated any right to dower that might exist in Marshall's wife. This question is based upon the difficulty that was at one time supposed to exist by reason of the grantee to uses holding in fee until he exercised the power of appointment, it being suggested that the estate and the power could not co-exist in the same individual.

At one time this question was greatly debated and an extraordinary diversity of opinion existed, but all doubt was put at rest by the decision of the Judges in the case of *Ray v. Pung*, 5 B. & Ald. 561. This case arose in Chancery and is found reported in (1821), 5 Madd. 310, where after a very full argument Vice-Chancellor Sir John Leach thought that the conflicting authorities created too much doubt to make it fit that the Court of Chancery should bind the purchasers without the further opinion of a Court of Law, and accordingly the opinion of the King's Bench Judges was taken; in the result a certificate was given by all the Judges to the effect that under the circumstances the wife was not dowable out of the lands in question in case of her surviving her husband. From that time on, no doubt was expressed as to the law until a note appeared in Mr. Armour's book on Real Property, p. 114, in which reference is made to the great authorities acquainted with the mediæval learning necessary to appreciate fully the difficulties surround-

App. Div. ing the whole situation whose opinions were in conflict, and the
1925. opinion expressed by the Justices of the King's Bench is disposed
of by the brief words: "see also *Ray v. Pung*."

RE HAZELL.

Middleton,
J.A.

Since then, a quite unnecessary unrest seems to have developed in certain quarters, as evidenced by the numerous applications under the Vendors and Purchasers Act referred to in the judgment in review.

It was suggested upon the argument that the case of *Ray v. Pung* did not really determine the question, because in that case the property was conveyed to an intermediary and not to the husband. I am quite unable to see that this really makes any difference. Counsel arguing that case evidently did not regard the point as of importance, for *Barber*, representing the wife (5 B. & Ald. at p. 566) claimed dower because, although the trustee intervened, the fee had become vested in the husband, and, this being so, the dower attached. He also contended that the power of appointment was nugatory, being nothing distinct or different from the fee. To this *Preston*, for the other side, answered (p. 563) that when the settlor made the appointment the qualified and determinable fee came to an end, and the wife's dower, being merely incidental to it, came to an end with it. Upon the exercise of the power of appointment, the appointee took his estate in the same manner as if it had been inserted in the original deed creating the power and had stood in the place of the power. He did not claim title under the husband but under the grantor to the husband. He also relied (p. 565) upon the language of Lord Eldon in *Maundrell v. Maundrell*, 10 Ves. at p. 255, as shewing that a power and the fee may well subsist distinctly in the same person, and that the power is not merged in the fee—the case of *Goodill v. Brigham*, 1 B. & P. 192, suggesting a different doctrine, being out of harmony with the general course of the law. The difficulty arises from the fact that no reasons for the opinion of the Court were given, the Judges merely signing a certificate to the Court of Chancery that the wife was not entitled to dower.

The true significance of the case can best be determined by early references to it. I find that in *Moody v. King* (1825), 2 Bing. 447, a case upon a somewhat different point, counsel upon the one side (p. 456) cited it as a case in which "all the authorities on the subject were examined, and it was holden that an estate in fee to the use of A.B. *until appointment*," and in default of appointment to the use of A.B. and his heirs, "was not subject,

after appointment, to dower for the widow of A.B." Counsel upon the other side cited it as shewing that "a purchaser under an appointment takes by virtue of the original deed of conveyance, which by giving the estate at once to the purchaser, prætermits the immediate appointor, leaving nothing on his part to which the right of dower can attach."

App. Div.

1925.

RE HAZELL.

Middleton,
J.A.

In *Chance on Powers*, published in 1831, the learned author, in para. 43, says: "Some years ago, the question was much disputed how far a power over the inheritance could co-exist with a fee in the same person. Having regard to the authorities, it is perhaps singular that the point could ever have been doubted. The question now at least is perfectly settled; it cannot, therefore, be necessary to enter at large into the subject."

Of even greater significance is the action of Lord St. Leonards, in the editions of his book upon *Powers*, following the decision, for he was one of the protagonists in the original struggle. The conflict between the earlier authorities continues to be reviewed and the opinion of Lord Eldon is referred to. An unreported case is mentioned as having decided the question against the right of dower, and the text proceeds:—

"The point was decided the same way in the later case of *Ray v. Pung*, which sets the point at rest:" see the 8th ed., p. 480.

Lord Eldon's decision in *Maundrell v. Maundrell*, 10 Ves. 246, leaves no room for doubt as to his opinion. He interrupts the argument saying (pp. 248, 249):—

"I consider it perfectly settled by the cases. . . . that the divisor gets, not only the fee in the estate divided, but a power, as well as an interest; which he had not before. I would not have heard this argued ten years ago; knowing personally, that this doctrine is directly contrary to the whole system of conveyancing, the constant course of. . . . all the great conveyancers."

At the close of the argument he says (pp. 254, 255, 256):—

"With all due respect to the decision in the Court of Common Pleas I must say, that case brings into question a doctrine, that both in principle and practice was clearly settled before: whether it is possible for a man to take to himself a power of limiting an estate by deed, will, writing, attested, as required; at the same time taking to himself the whole interest in the fee, over which the power is to be exercised. I am perfectly sure from my own experience, the practice was universal. . . . The great names I have mentioned confirmed by their practice what Mr. Butler states:

App. Div.
 1925.
 RE HAZELL.
 Middleton,
 J.A.

that the fee vests until execution of the power. . . . It cannot be represented as a question of any doubt, that such a power may be reserved to the person having the fee; and is capable of being executed. The extent to which the contrary proposition would go in affecting titles, is surprising; and therefore the statement of any doubt upon it is alarming."

This is the view entertained more than a century ago. Recent text-writers of the highest standing give no uncertain sound. For example, Lord Justice Farwell (*Powers*, 3rd ed., p. 45) quotes, as his 11th proposition, "A power may co-exist with the fee," amplifying thus: "If a man limits his estate to such uses as he shall appoint, and in the meantime and until such appointment to the use of himself and his heirs, the fee simple continues to reside in the settlor, subject to be divested by an exercise of his power of appointment."

In Halsbury, vol. 24, p. 192, note (m), it is said: "If land is limited to such uses as the husband shall appoint, and in default of appointment to himself in fee, dower attaches at once, because he is seised until the execution of the power. . . . but upon the execution of the power the right to dower is defeated." For this *Ray v. Pung* is cited.

"When the husband's fee, by virtue of which the wife claims dower, is liable to be defeated by the exercise of a power vested in the husband, such an exercise of the power will defeat the wife's right to dower:" Challis's *Law of Real Property*, 3rd ed., p. 347; *Ray v. Pung* being given as the sole authority.

In Tudor's *Leading Cases on Real Property*, 4th ed., p. 114, the statement is repeated in almost the same words.

I have made this somewhat tedious review of the authorities for the purpose of shewing that the doubt which once existed was removed more than a century ago. It is a well-established principle of real property law that questions such as this once, placed at rest, should not be again agitated, even if it should be shewn that the earlier decisions are not in all respects satisfactory. Here, however, the great weight of reason, as well as of authority, is in favour of the conclusion arrived at.

The next question is as to the effect of the second conveyance to uses. This is satisfactorily dealt with by the judgment in review, and nothing can be usefully added.

The remaining question arises as to the effect of the registration of the discharge of the *Vila* mortgage. This is dealt with by

Mr. Justice Logie very briefly. He thinks that the discharge operated to reconvey to Brown "the original estate of the mortgagor in the lands." In this I find myself unable to agree with him. The question is not widely different from that dealt with by the Supreme Court in *Lawlor v. Lawlor* (1882), 10 Can. S.C.R. 194. That was a culmination of much litigation as to the effect of a statutory discharge of mortgage made by a tenant-in-tail. By virtue of the Act now found as the Estates Tail Act (R.S.O. 1914, ch. 113, sec. 8), if a tenant-in-tail makes a mortgage, this, to the extent of the estate thereby created, is an absolute bar of the estate tail and conveys to the mortgagee the fee simple in the land, or such lesser estate as may be specified by the mortgage. Upon the discharge of the mortgage, the effect of the provision of the Registry Act (now found as R.S.O. 1914, ch. 124, sec. 67) was held to be the vesting in the mortgagor, not his original estate tail, but the fee simple in the land barred of the entail. So here, the mortgage operating as a grant and mortgage in fee simple by reason of the execution of the power, the effect of the statutory reconveyance is to vest in the mortgagor, not the original power of appointment, but the fee simple. By the execution of the power the mortgagee acquired an estate never vested in the mortgagor. This aspect of the case does not appear to have been presented to my learned brother, or to have been considered by him, so with great deference I find myself compelled to answer this particular question in the opposite way.

App. Div.
1925.
RE HAZELL.
Middleton,
J.A.

In perusing the papers in this case, I cannot avoid the suspicion that it is more than a fortunate coincidence which raises this extraordinary combination of questions upon one title.

The sequence of the deeds giving rise to the questions submitted is most suggestive. Long ago in *Brewster v. Kitchen* (1698), Comberbach 424, Chief Justice Holt said: "I thought this feigned issue had been directed out of Chancery, else I would not have tried it; do you bring fob actions to learn the opinion of the Court?" Attention then being called to the fact that a feigned action had been entertained by the Court, in anticipation of a real dispute, the Chief Justice remarked that when *Anderson* heard of this he "was very angry."

I draw attention to this, for it cannot be too plainly emphasised that a feigned application intended to prejudice the rights of other litigants is a gross form of contempt of Court. My suspicions may have no foundation in fact.

App. Div. The order below will be varied as indicated, and no order will
1925. be made as to costs.

RE HAZELL. LATCHFORD, C.J., and LENNOX, J., agreed with MIDDLETON,
Middleton, J.A.
J.A.

ORDE, J.A., agreed in the result.

Order below varied as stated.

[APPELLATE DIVISION.]

RE BROWN AND ARGUE.

1925.

June 5.

Illegitimacy—Child Borne by Married Woman—Evidence of Husband and Wife Tending to Bastardise Child—Inadmissibility—Presumption of Legitimacy—Evidence to Rebut—Possibility of Marital Intercourse—Admission of Adulterer Charged as Father of Child—Insufficiency—Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54—"Child Born out of Wedlock."

The evidence of a man and his wife, given for the purpose of bastardising a child born during wedlock, and at a time consistent with lawful conception, is not admissible.

Russell v. Russell, [1924] A.C. 687, followed.

The legitimacy of a child born during wedlock is to be presumed; and the presumption cannot be rebutted unless it is shewn that marital intercourse was impossible; and is not to be rebutted by shewing that another man or other men had sexual intercourse with the married woman.

Gordon v. Gordon, [1903] P. 141, followed.

A., who had had sexual intercourse with a married woman, signed an admission of "the paternity of a child to be born out of wedlock to" the married woman:—

Held, that this was not sufficient to rebut the presumption of the legitimate conception of the child—it must be taken to be no more than an admission of adulterous intercourse.

The Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54, was passed for the protection of "a child born out of wedlock;" and a child is entitled to the protection of the statute, even though the issue of a married woman, if the fact that it is the offspring of adulterous intercourse is established by competent evidence.

Re Duckworth and Skinkle (1924), 55 O.L.R. 272, followed.

AN appeal by Melvin Argue from an order of the Judge of the Juvenile Court, Toronto, finding that the appellant was the father of an illegitimate child and requiring him to pay certain sums for the maintenance and care of the child's mother and for the maintenance and education of the child.

May 13. The appeal was heard by LATCHFORD C.J., MIDDLETON and MASTEN, J.J.A., and FISHER, J.

A. J. Lester, for the appellant, contended that the purpose of the Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54, was to protect, not to bastardise, the child. Reference to *Re Duckworth and Skinkle* (1924), 55 O.L.R. 272; *Russell v. Russell*, [1924] A.C. 687, 708. The evidence, therefore, of the married woman tending to deny her husband's parentage of the child born during wedlock was inadmissible. The husband's evidence was similarly so. The practice of admitting such evidence, subject to the

App. Div.
1925.
RE BROWN
AND ARGUE.

objections to it made by counsel, is bad. When the husband has had access to the mother in a case such as this, it is not the policy of the Court to inquire whether or not he is the father of the child. *Re Hunt and Lindensmith* (1921), 51 O.L.R. 320, referred to. Before the evidence of husband or wife denying the husband's parentage can be admitted, proof of his physical impotency or the impossibility of his having had access to the woman is required. In the present case the only part of their evidence which was admissible was that proving their marriage. The Act was intended to apply only to the case of an unmarried woman. Reference to *Jones v. Davies*, [1901] 1 K.B. 118, followed in *Marshall v. Malcolm* (1917), 87 L.J.K.B. 491; *Gordon v. Gordon*, [1903] P. 141; *Kijko v. Baczyski* (1921), 51 O.L.R. 225; *Holland v. Holland* (1925), 41 Times L.R. 431.

F. P. Brennan, for the Provincial Officer, respondent, argued that the Ontario statute is broader than the English Act—the latter is confined in its application to unmarried women. Here, the statement provided for, signed by the appellant, was sufficient evidence of his paternity to support the Judge's finding.

June 5. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal on behalf of the putative father from a judgment of his Honour Judge Mott, in the Juvenile Court at Toronto, dated the 22nd October, 1924, by which it is declared that the appellant is the father of a child, born out of wedlock to Edna Brown, on the 20th July, 1924, and by which he is ordered to pay to the Provincial Officer \$59 for the maintenance of the mother at the time of the child's birth, and \$3 weekly, from the birth of the child, for its education and maintenance until the child attains the age of sixteen years.

It appears that the mother of the child was married on the 10th November, 1922, to one Roy Brown. Before the Juvenile Court the husband and wife both testified, and from the evidence it appeared that they separated in 1923, and remained separated until February, 1924. In September, 1923, the woman met Argue for the first time at a corn-roast, and connection took place that day. During the time the husband and wife were separated she lived at her mother's house, and the husband, who was generally living in Hamilton, called upon her at the mother's house from time to time. She appears to have told her husband of her misconduct with Argue, and her husband went with her to lay the charge against Argue. Argue, not disputing his guilt, signed an agreement with the Provincial Officer, bearing

date the 26th April, 1924, some months before the child was actually born, by which he admitted the paternity of the child to be born, and agreed to pay to the Provincial Officer \$3 per week from the birth of the child until sixteen, together with expenses incident to the birth. At this time Argue was about 19 years of age. Default occurring in making the payments provided for by the agreement, these proceedings are taken, the only evidence being that of the husband and wife, and of an inspector employed by the Department, who witnessed the signature of Argue to the agreement.

App. Div.
1925.
RE BROWN
AND ARGUE.
Middleton,
J.A.

It is plain that the evidence of the husband and wife, given for the purpose of bastardising a child born during wedlock, and at a time consistent with lawful conception, is not admissible: *Russell v. Russell*, [1924] A.C. 687, is conclusive upon this.

The learned Judge of the Juvenile Court, in transmitting the evidence, accompanies it with a note in which he recognises that this evidence was improperly admitted. Rejecting it, there is nothing remaining to shew non-access; and, upon the principle of *Gordon v. Gordon*, [1903] P. 141, the legitimacy of a child born during wedlock is to be presumed. This presumption cannot be rebutted unless it is shewn that intercourse was impossible. If the evidence of the husband and wife here is accepted, it fails to establish this fact, for the husband was living not far from the wife and frequently called upon her.

The case then rests entirely upon the document signed by the appellant. He "admits the paternity of a child to be born out of wedlock to Edna Brown." I do not think this is sufficient to rebut the presumption of the legitimate conception of the child. The case referred to and others there cited, e.g., *Cope v. Cope* (1833), 1 Moo. & R. 269, shew that "the presumption of legitimacy is not to be rebutted by its being shewn that other men also had sexual intercourse with the woman. The law will not, under such circumstances, allow a balance of the evidence as to who is most likely to have been the father."

Fairly understood, the admission signed by Argue, in the circumstances disclosed, must be taken to be no more than an admission of adulterous intercourse with this woman; and that, standing alone, is quite insufficient to establish that he is the father of the child in question.

It was strongly argued before us that the Children of Unmarried Parents Act can have no application to the case of a child born to a married woman, or at any rate to a married woman not proved to have been separated from her husband, and certain Eng-

App. Div.
1925.

RE BROWN
AND ARGUE.

Middleton,
J.A.

lish cases going to shew that such a woman is not "a single woman," within the terms of the English Act, are cited. We have already decided that, in view of the different phraseology used in our Act, which was passed for the protection of "a child born out of wedlock," such a child is entitled to the protection of the statute, even though the issue of a married woman, if the fact that it is the offspring of such adulterous intercourse is established by competent evidence: *Re Duckworth and Skinkle*, 55 O.L.R. 272.

The appeal will be allowed and the order made in the Court below vacated. It is not a case for costs.

Appeal allowed.

[APPELLATE DIVISION.]

1925.

GOODISON THRESHER CO. v. DOYLE.

June 5.

Contract—Written Offer (not under Seal) to Buy Machine—Withdrawal before Acceptance—Attempted Acceptance after Withdrawal—Exclusion of Agent's Authority to Contract—Impossibility of Ratification.

The defendant signed a document which purported to be an agreement between the plaintiff company and himself for the sale by the company to him and the purchase by him from the company of a machine, upon the terms of the agreement, "which is to be approved of by the said company with or without notice to the purchaser." The machine was then described and the price stated. It was expressly provided in the document that it contained the whole agreement, and that it should not bind the company until accepted at the head-office. The signature was procured by an agent of the company, but he did not sign the agreement on behalf of the company. He sent it to the head-office, and four days later the defendant wrote to the company, treating the document as an offer on his part and cancelling the offer. There was no acceptance by the company until after the defendant's letter had been received. The document, though signed, was not sealed by the defendant. It was never signed by the company:—

Held, that the document was no more than an offer, and, being withdrawn before acceptance, there was no contract, and there could be no ratification.

Bolton Partners v. Lambert (1889), 41 Ch. D. 295, distinguished.

AN appeal by the defendant from the judgment of the County Court of the County of Carleton in favour of the plaintiffs in an action to recover the price of a second-hand threshing machine.

May 13. The appeal was heard by LATCHFORD C.J., MIDDLETON and MASTEN, J.J.A., and FISHER, J.

T. A. Beament, K.C., for the appellant, contended that the evidence shewed that the document signed by him was nothing more than an offer to the plaintiffs to buy the machine—an offer made

upon their own printed form, and not a completed contract. This offer had afterwards been revoked by the appellant before its acceptance by the plaintiffs.

F. D. Hogg, for the plaintiffs, respondents, argued that, although their printed form called for "approval" by them, it was not intended that their agent should have no authority to bind them, but merely that there should remain to them afterwards the privilege of avoiding the contract, as in the case of a contract of insurance. Reference to *Bolton Partners v. Lambert* (1889), 41 Ch. D. 295. The respondents, having put their agent in a position to contract and said to him that they would waive, in advance, any right to rescind, had vested him with authority to make a complete contract of sale, and afterwards ratified what he had done.

June 5. The judgment of the Court was read by MASTEN, J.A.:—This is an appeal from the judgment of O'Brian, County Court Judge, sitting without a jury in the County Court of the County of Carleton. The judgment is dated the 10th March, 1925, and is in favour of the plaintiffs for the full amount of their claim with costs.

The defendant appeals on the grounds: that the approval of the plaintiff company was a condition subsequent; that the writing signed by the defendant was merely an offer, without consideration, which was revoked before acceptance; and that no binding contract was ever entered into between the parties.

The action is for the price of a threshing machine which the plaintiffs allege was sold by them to the defendant. The claim is founded on an alleged agreement dated the 25th June, 1922, which purports to be made between the plaintiff company (the John Goodison Thresher Company of Sarnia Limited) and the defendant. It was signed on its date by the defendant, but has never been signed by the plaintiff company. The agent of the plaintiff company, James C. Wilson, well knowing that he had no authority so to do, did not purport to sign or accept for the company, but sent the document signed by the defendant (exhibit 1) to the head-office of the plaintiff company for acceptance there. On the 29th June, four days after signing exhibit 1, the defendant wrote to the plaintiff company as follows:—

"Osgoode Station, Ont., June 29-22.

"The John Goodison Thresher Co. Ltd., Sarnia, Ont.

"Dear Sirs: I hereby notify you that I do not desire or intend to purchase from your company the second-hand White

App. Div.

1925.

GOODISON
THRESHER
Co.
v.
DOYLE.

App. Div.

1925.

GOODISON
THRESHER

Co.

v.

DOYLE.

Masten, J.A.

thresher, stacker and feeder, as described in a written offer of purchase made by me and dated the 25th day of June, 1922. It will be useless for you to attempt to deliver the machine referred to, as I do not intend to accept delivery of same. I hereby cancel the offer of purchase contained in the said contract.

"Yours truly,

"Anthony Doyle."

This letter was received by the plaintiffs before any acceptance of the offer had been determined on by them, and it was not until the plaintiffs' letter of the 4th July that their acceptance was notified to the defendant.

The plaintiffs contend that their acceptance operated as a ratification of a contract made on the 25th June, and that the defendant's attempted withdrawal of his offer, on the 29th June, was nugatory.

The judgment of the learned trial Judge is founded on *Bolton Partners v. Lambert*, 41 Ch. D. 295. But I am of opinion that the facts of this case make it clearly distinguishable from that case, and that the contentions of the present appellant ought to be maintained. *Bolton Partners v. Lambert* was an action for specific performance brought by the vendors of leasehold premises. The order of the occurrences in that case was as follows: (1) Lambert writes to one Scratchley, a director of Bolton Partners Limited, offering to buy certain leasehold premises of that company; (2) Scratchley submits Lambert's offer to a committee of the directors of the plaintiff company. The committee approves the acceptance of the offer and instructs Scratchley to write Lambert accordingly, but the committee itself had no authority to bind the company, as its lands could be sold only by direction of the full board of directors; (3) on the authority of the committee, Scratchley writes to Lambert accepting his offer in the name of the company; (4) the next occurrence is that Lambert withdraws his offer to buy; (5) the plaintiff company then issues a writ for specific performance; (6) after the issue of the writ, the board of directors confirms the action of its committee on works and confirms Scratchley's letter of acceptance. It was held that the ratification by the board of directors related back to the date of Scratchley's acceptance of Lambert's offer, and that Lambert's attempted withdrawal of his offer was nugatory.

Thus there was in that case an agreement in form between the company and Lambert prior to Lambert's withdrawal of his offer. See the judgments of Cotton, L.J., at the top of p. 308, of

Lindley, L.J., at the foot of the same page, and of Lopes, L.J., where he says at pp. 309 and 310:—

“It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant’s offer had no authority to act for the plaintiffs. Directly Scratchley on behalf and in the name of the plaintiffs accepted the defendant’s offer I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority.

“The plaintiffs subsequently did adopt the contract, and thereby recognised the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it.”

In view of the observation of the Privy Council in *Fleming v. Bank of New Zealand*, [1900] A.C. 577, at p. 587, reserving liberty to reconsider the authority of *Bolton Partners v. Lambert*, the doctrine of that case ought not to be extended.

Turning now to the facts of this present case which in my view distinguish it from *Bolton Partners v. Lambert*, I observe that the opening clause of the alleged agreement is as follows:—

“The company agrees to sell to the said purchasers, who jointly and severally agree to buy upon the terms of this agreement, which is to be approved of by the said company with or without notice to the purchasers.”

There follows a description of the article sold and the price, and then the following clauses bearing on the present controversy:—

“There are no warranties, guarantees or agreements express or implied other than those contained herein, and the company shall not be held responsible for any statements made at any time in any way or by any person in connection with this matter unless expressed in this contract. It is also understood that no money is to be paid on account herein to any person without the written order of an officer of the company at the head-office.

“This contract is taken subject to the approval of the said company and may be cancelled by them at any time if not found satisfactory or they should be unable to supply the said machine, but it is not subject to cancellation by purchasers. The above order contains all the conditions in connection with the purchase.”

The above extracts make it plain that in this case the agent was expressly, by the terms of the document signed, debarred from making any contract on behalf of the company, and no contract

App. Div.

1925.

GOODISON
THRESHER

Co.

v.
DOYLE.

Masten, J.A.

App. Div. was made by him with the defendant either on behalf of the company or personally on his own behalf.
1925.

GOODISON
THRESHER

CO.

v.

DOYLE.

Masten, J.A.

The result may be restated as follows:—

1. The written offer, exhibit 1, signed by the defendant, expressly provides that it contains the whole of the alleged agreement within its four corners. Hence it follows that evidence dehors exhibit 1 to establish oral arrangements between the defendant and Willson, the plaintiffs' agent, cannot be given in evidence.

2. The alleged agreement expressly provides that it shall not bind the plaintiff company until accepted by its head-office. The agent is thus on the face of the document expressly precluded from accepting the defendant's offer, and he did not purport so to do.

3. The result is that exhibit 1 is an offer by the defendant, and nothing more. Not being under seal, it could be withdrawn before acceptance.

It is noteworthy that the legal advisers of the plaintiff company recognised the fact that to make this offer irrevocable it was essential that it should be made under seal, and they have endeavoured in the form to indicate that it should be so executed, but this was not done.

The doctrine of ratification has been judicially stated as follows:—

"Where a principal on whose behalf a contract has been made, though it may be made in the first instance without his authority, adopts it and ratifies it, then, whether the contract is one which is for his benefit and which he is enforcing, or which is sought to be enforced against him, the ratification is referred to the date of the original contract, and the contract becomes as from its inception as binding on him as if he had been originally a party."

Ratification thus postulates an agreement capable of being ratified, but here there was no agreement on which ratification could operate, for by the terms of the offer the plaintiffs' agent could not accept it. The distinction between this case and *Bolton Partners v. Lambert* is that in that case Scratchley assumed to agree on behalf of and in the name of the company to sell its lands. There was an agreement in form which was afterwards duly ratified. Here there never was anything purporting to be an agreement by or on behalf of the plaintiff company until a date subsequent to the withdrawal by the defendant of his offer.

For these reasons, I would allow the appeal and dismiss the action, both with costs.

Appeal allowed.

[APPELLATE DIVISION.]

AMERICAN FOOTWEAR CO. v. LANCASHIRE AND GENERAL
ASSURANCE CO.1925.
June 5.

Insurance (Fire)—Action on Policy—Defence—Concurrent Insurance Clause—Meaning of—Failure of Concurrent Insurer to Pay—Reliance on Terms of Contract—Attempt of Insurers to Set up Invalidity of Contract—English Company not Licensed in Ontario—Failure to Prove—Pleading—Rules 142, 143—Amendment not Sought—Refusal to Consider Question of Validity—Illegal Contracts.

In an action upon a policy of fire insurance, the defendants, after admitting the policy, alleged that it contained a clause providing that it should be subject to the same conditions, endorsements, assignments, alterations of rates, and adjustment of losses, as the other policies covering the same property; that the other companies had not paid; and the defendants were not called upon to pay:—

Held, that the defendants were entitled to rely upon any clause or term in the policy—certainly if pleaded, and possibly without plea. But this was not a good defence: the clause meant that the defendants were to have all the benefits that the contract gave to other companies—not that if one company broke the contract to pay, any other might do the same.

In this view, it was unnecessary to consider whether *Burson v. German Union Insurance Co.* (1905), 10 O.L.R. 238, was well decided, or to consider the English cases on illegal contracts.

At the trial of the action it was contended for the defendants that the plaintiffs must produce and establish in evidence a contract and shew it to be enforceable in Ontario, and that they had not done so because their head-office was in England and they had no license to do business in Ontario. This was not set up in the pleadings, and the defendants did not ask leave to amend:—

Held, that, as the defendants had admitted the contract, no duty was cast, at least in the first instance, on the plaintiffs to prove its legality; and, without an amendment, evidence tending to shew its invalidity should not have been admitted.

Rules 142 and 143 considered.

Lake Erie and Detroit River Railway Co. v. Sales (1896), 26 Can. S.C.R. 663, distinguished.

No attempt was made to prove that the defendants were not registered under secs. 66 and 68 of the Ontario Insurance Act, R.S.O. 1914, ch. 183; and the Court should not delay justice by directing an inquiry as to the fact.

AN appeal by the plaintiffs from the judgment of MOWAT, J., at the trial (2nd April, 1925), dismissing an action brought upon a policy of fire insurance.

May 28. The appeal was heard by RIDDELL, J., MIDDLETON, MASTEN, and SMITH, J.J.A.

Gideon Grant, K.C., and *I. Levinter*, for the appellants.

A. C. Heighington, for the defendants, respondents.

The following authorities were referred to: *Burson v. German Union Insurance Co.* (1905), 10 O.L.R. 238; *Montgomery v. Saginaw Lumber Co.* (1906), 12 O.L.R. 144; the Ontario Insurance

App. Div. Act, R.S.O. 1914, ch. 183, sec. 98; the Ontario Insurance Act,
 1925. 1924, 14 Geo. V. ch. 50, sec. 250; *Craig v. McKay* (1904), 8 O.L.R.
 651; *Lake Erie and Detroit River Railway Co. v. Sales* (1896), 26
 Can. S.C.R. 663.

AMERICAN
 FOOTWEAR
 Co.
 v.
 LANCASHIRE
 AND
 GENERAL
 ASSURANCE
 Co.

June 5. The judgment of the Court was read by RIDDELL, J.:—The statement of claim alleges a policy of insurance against loss by fire for \$3,000; fire during the life of the policy; damage, \$9,000; concurrent insurance, \$8,500 and the defendants' proportion adjusted at \$2,327.14; delivery of proofs of loss—and the claim is made for \$2,327.14, interest and costs.

The statement of defence, as at first filed, denied certain allegations, but an amendment was made under order of the Master, so that the defence, after admitting the policy, now simply sets up that the policy issued by the company contained a clause that it should be subject to the same conditions, endorsements, assignments, alterations of rates, and adjustment of losses, as the other policies covering the same property; that the other companies had not paid; and that, as the other company had not paid, the defendants were not called upon to pay.

Issue was joined.

In view of Rules 142 and 143, the sole question to be tried was that of the concurrent insurance.

At the trial the defendants were represented by counsel not theretofore connected with the case; and, as he informs us, he saw or thought he saw a defence not set up by his clients—his conception of the law was that the plaintiffs must produce and establish in evidence a contract and prove it to be enforceable in this Province. Accordingly he determined to set up the defence that his clients had not the right to make the contract which admittedly they did make. At the opening of the case counsel said:—

"I take the position, my Lord, that the head-office of this company is the Lancashire House, London, England, and we have no license to do business in this country; and, to be perfectly frank, in this case we think that we are justified in setting up with these particular plaintiffs, under the circumstances of their loss, that they have no right of action in this Province, and we refer to —"

Whereupon the following took place:—

"His Lordship: You set that up in your pleadings?"

"Counsel: No, my Lord, it is not set up in the pleadings. I don't think we need to do that as a matter of fact. The plaintiffs have to produce a contract which is enforceable in this Province, or you Lordship cannot act on it. I want this case strictly proved."

At the conclusion of the evidence, he stated his position: "I cannot sue for this premium, and they take the same chances with us."

While counsel took upon himself the whole responsibility for this contention at the trial, he continued to insist upon it before us, and consequently we must take it that it is the deliberate policy of this company. It cannot be too widely known that a company called the Lancashire and General Assurance Company Limited, of the City of London, England, and having its head-office in the Lancashire House in that city, issues what purport to be fire insurance policies, taking premiums for them, and then says to the unfortunate sufferers by fire whose money has been obtained on pretence of insuring them against fire, "We will pay you if it suits us—if it doesn't we won't."

This defence, however, the defendants did not set up in the pleadings—counsel did not ask an amendment at the trial and did not ask an amendment before us. They insist upon the strict law, and we have no right to compel them to amend when they do not wish to amend. We should deal with the case on the pleadings.

Rule 143 is specific that the statement of defence "shall raise all matters which shew that . . . the transaction is either void or voidable in point of law, and all such grounds of defence as . . . would raise issues of fact not arising out of the preceding pleadings, as for instance . . . facts shewing illegality . . . by statute . . ."

Under this Rule, I am of opinion that without an amendment no evidence should have been allowed tending to shew the invalidity of the policy of insurance.

In any event, no duty was cast, at least in the first instance, on the plaintiffs to prove its legality.

An admission of a contract without qualification or limitation is, of course, an admission that the contract is a contract, not a scrap of paper.

Counsel seems to have thought that the principle of *Lake Erie and Detroit River Railway Co. v. Sales*, 26 Can. S.C.R. 663, applies. In considering how far this case is now of authority, it must be borne in mind that it was decided before the latter part of Rule 142* was passed. But, assuming without deciding that this

* 142. Each party shall admit such of the material allegations contained in the pleading of the opposite party as are true, and a defendant shall not deny generally the allegations contained in the statement of claim but shall set forth the facts upon which he relies even though this may involve the assertion of a negative.

App. Div.

1925.

AMERICAN
FOOTWEAR
Co.
v.
LANCASHIRE
AND
GENERAL
ASSURANCE
Co.

Riddell, J.

App. Div.

1925.

AMERICAN
FOOTWEAR
Co.

v.

LANCASHIRE

AND
GENERAL
ASSURANCE
Co.

Riddell, J.

case is still good law, it does not assist the defendants—it simply decides that in an action on a contract the defendant may take advantage of any term in the contract in his favour even though he does not plead it. So here, any term in the policy can be taken advantage of by the defendants (assuming the case to be good law).

I cannot see that the plaintiffs are called upon to go farther and specifically prove that their contract is valid as not violating a statute.

The course taken at the trial was as follows:—

The plaintiffs, being called upon to make their case, put in the policy (admitted in the pleadings); the defendants were not allowed to withdraw the admissions; the plaintiffs proved the loss by fire; put in a concurrent insurance policy; adjustment at \$9,000; delivery of proofs of loss.

In the course of this proof, the fact came out upon which the only defence on the pleadings was based, namely, that another company had not paid its insurance, and perhaps would not without a compromise—this will be dealt with later.

Counsel for the defendants, in cross-examination, asked some questions apparently looking toward although not bearing upon the new defence.

The agent under cross-examination says:—

“Q. In this class of insurance did you apply to any companies licensed to do business in Canada for this risk? A. Yes.

“Q. Was it refused? A. Yes.

“Q. You were unable as a matter of fact to place it in licensed companies? A. That is true.”

But no attempt was made to prove that the defendant company was not registered under secs. 66 and 68 of the Ontario Insurance Act, R.S.O. 1914, ch. 183—the above evidence being of course directed to companies “licensed by the Dominion of Canada,” as referred to in sec. 69 (1).

I cannot see that the non-licensing to do business in Canada has any bearing upon the status of the defendant company—even if, by inference, it could be considered that it was not so licensed.

The plaintiffs before us asserted that if the non-registry of the defendant company under the Insurance Act had been raised in the pleadings, they would have shewn that the defendant company had been approved by the Minister under sec. 100—this was vehemently contested by the defendants; but I think we need not now go into the matter.

The contract being proved and admitted, the plaintiffs not

being called upon to establish that it is not void or voidable under the statute, and the defendants having failed to do so—there being nothing before the Court in the way of evidence or anything else but counsel's bald assertion, without support by affidavit or otherwise, on the one hand, and direct contradiction on the other—I do not think that the Court is required to have or justified in having an inquiry made and justice delayed.

Unless there be something in the other defence, that raised by the statement of defence, the plaintiffs should succeed.

The defendants are entitled to rely upon any clause or term in the policy—certainly if pleaded, and possibly without plea: *Lake Erie and Detroit River Railway Co. v. Sales, ut supra.*

The clause reads as follows:—

“This policy is also subject without notice to the same conditions, endorsements, assignments, alterations of rates, and adjustment of losses, as are or may be assumed in policy or policies of other companies, and following in particular the Accident Insurance Co. of Cuba, covering \$3,500 on the identical subject-matter and risk.”

The defendants say in effect: “The Cuba company hasn't paid; so we will not either.” The condition bears no such interpretation; what it means is that the defendants are to have all the benefits the contract gives to the Cuba company in certain respects; it does not mean that if one company break the contract to pay, the other may do the same. There is no “After you”—or neither company could ever be made to pay.

In the view I take of the case, we are relieved from considering the case of *Burson v. German Union Insurance Co.*, 10 O.L.R. 238; I am not to be taken as considering it well decided.

Neither need we consider the line of cases in England on illegal contracts, from *Bartlett v. Vinor* (1692), Carth. 251, through *D'Alax v. Jones* (1854), 26 L.J. Ex. 79, *Cope v. Rowlands* (1836), 2 M. & W. 149, *Victorian Daylesford Syndicate Ltd. v. Dott*, [1905] 2 Ch. 624, to *In re Mahmud v. Ispahani*, [1921] 2 K.B. 716 (an extremely hard case reconcilable with justice only on the principles *Salus populi suprema est lex* and *Inter arma silent leges*), and *Eisen v. McCabe Ltd.* (1919-20), 57 Sc.L.R. 126, 534.

I would allow the appeal and direct judgment to be entered for the amount claimed with interest and costs—the appellants to have the costs of the appeal.

Appeal allowed.

App. Div.

1925.

AMERICAN
FOOTWEAR
Co.

v.

LANCASHIRE
AND
GENERAL
ASSURANCE
Co.

Riddell, J.

[APPELLATE DIVISION.]

1925.

ARNOLDI V. TREMAINE.

June 5.

Solicitor — Bills of Costs Rendered more than a Year before Action Brought to Recover Amount — Absence of Itemised Charges — Amendment to Solicitors Act, sec. 34, by 10 & 11 Geo. V. ch. 45, sec. 2—No Order for Taxation Obtained within the Year—Sec. 36 (1) of Principal Act—Order for Taxation Made by Trial Judge under General Jurisdiction of Court—Discretion—Appeal.

The action was brought by a solicitor against his client to recover the amount of certain bills of costs. Two of the bills were delivered more than a year before the action was brought, and no order for taxation has been taken out under the Solicitors Act, R.S.O. 1914, ch. 159. One of the bills had no itemised charges—a lump charge of \$1,200 was made. In the other the charges were partly itemised. Both bills conformed to sec. 34(3) of the Solicitors Act, as amended by the Solicitors Amendment Act, 1920, 10 & 11 Geo. V. ch. 45, sec. 2:—

Held (RIDDELL, J., dissenting), that the Judge at the trial of the action properly referred the bills to the Taxing Officer for taxation, although the client had lost the right to a taxation under the statute.

The charges were large, if not excessive, and the plaintiff should prove his case in some satisfactory way before some one competent to pass upon the value of the services rendered.

The Court has a discretion to direct taxation quite apart from the Solicitors Act, sec. 36(1); the discretion was properly exercised by the trial Judge; a taxation was necessary to enable justice to be done. Solicitors' fees, since the amendment of the Act, being dealt with on the footing of a *quantum meruit*, a solicitor should not be permitted to recover, without criticism, the lump sum that he assesses as the value of his services, most of the services being rendered in the absence of the client, and being of such a nature as to preclude the client from forming any proper judgment as to their real value.

Review of the authorities.

Storer & Co. v. Johnson (1890), 15 App. Cas. 203, followed.

Jones & Son v. Whitehouse, [1918] 2 K.B. 61, considered.

Per RIDDELL, J.:—Following the *Jones* case, there should be no order for taxation of the bills generally. If a taxation were directed in the exercise of the general jurisdiction of the Court, it should be only in respect of items specified by the defendant as extravagant or unreasonable. In this case there was no such specification, and no plausible ground of defence was shewn. There should be judgment for the plaintiff for the amount sued for.

AN appeal by the plaintiff from the judgment of ROSE, J., at the trial (7th April, 1925), of an action brought by a solicitor to recover the aggregate amount of certain bills of costs and a promissory note. The trial Judge referred two of the bills to the Taxing Officer to tax them and report the result to the Court, reserving further directions and the costs of the action and reference.

May 28. The appeal was heard by RIDDELL J., MIDDLETON, MASTEN, and SMITH, JJ.A.

The appellant, in person, contended that the bills should not have been referred to taxation, as they had been delivered more than twelve months before the action was brought. He relied upon the Solicitors Act, R.S.O. 1914, ch. 159, secs. 34, 36, and the Solicitors Amendment Act, 1920, 10 & 11 Geo. V. ch. 45; *In re Park* (1889), 41 Ch. D. 326; *Jones & Son v. Whitehouse*, [1918] 2 K.B. 61; *Millar v. The King* (1921), 49 O.L.R. 93, at p. 102; *Re Solicitor* (1920), 47 O.L.R. 522, 48 O.L.R. 363; Holmested's Judicature Act (1915), p. 1420.

Hugh J. McLaughlin, for the defendant, respondent, contended that, notwithstanding the provisions of the Solicitors Act referred to, the Court could intervene to prevent a solicitor from collecting exorbitant sums for costs even after the term of twelve months had elapsed. Reference to *Ex p. Ditton* (1880), 13 Ch. D. 318.

June 5. MIDDLETON, J.A.:—The sole question upon this appeal is as to the right of the Court to direct the taxation of a bill, in an action upon it, where the bill has been delivered for more than a year, so that the client has lost the right of taxation under the statute, save in special circumstances.

Unquestionably, early cases determined that the client, having failed to avail himself of the right given him by the statute to obtain taxation within the period limited by it, could not question the amount of the bill when action was brought upon it; but the decision of the Court of Appeal in *In re Park*, 41 Ch.D. 326, is a landmark, for there it was established that the Court had a discretion to direct taxation quite apart from the provisions of the Solicitors Act, and this is now beyond question by reason of the decision of the House of Lords in *Storer & Co. v. Johnson* (1890), 15 App. Cas. 203. There the year had gone by, and it was objected that there was no right to tax under the Solicitors Act, to which Lord Halsbury says (p. 206):—

“But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. . . . I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act.”

The reference to the terms of the Solicitors Act is to that provision of the Solicitors Act which made the costs of the taxation follow the result, depending upon the disallowance of more, or less,

App. Div.

1925.

ARNOLDI
v.
TREMAYNE.

App. Div. that one-sixth of the bill, a provision which is no longer found in
 1925. our Solicitors Act.

ARNOLDI
 v.
 TREMAINE.
 Middleton,
 J.A.

In *Lumley v. Brooks* (1889), 41 Ch.D. 323, the action was brought upon a bill. The defendant denied retainer, alleged negligence, and counterclaimed for damages. He did not appear at the trial. Mr. Justice Kay simply referred the bill for taxation under the provisions of the Solicitors Act. On an appeal being taken, it was held that the counterclaim should have been dismissed, and the judgment should have been for the amount to be found due upon taxation, with the costs of the action up to and including the hearing.

In *Lumsden v. Shipcote Land Co.*, [1906] 2 K.B. 433, Vaughan Williams, L.J., says (p. 437):—

“In my judgment the ordinary practice in an action on a solicitor’s bill is that the jury are told that they will not be troubled with the question of amount, and that question is settled by reference to a taxing Master, not under the Act . . . but as a referee to settle the amount.”

Stirling, L.J., who is a party to some of the earlier decisions, says (p. 438), in referring to the limitations of the Solicitors Act:—

“Nevertheless, the Court has power by virtue of its general jurisdiction to ascertain, by reference to its officer, the proper amount to be paid to the plaintiff for his services. In point of fact there is no difference in principle between such a case as the present and an action to recover the amount due for work and labour done in any other case. It is within the jurisdiction of the Court to order that the items of a claim shall be gone into before a referee, and in the present case there is power to ascertain, through a taxing Master, the proper amount of remuneration.”

Fletcher Moulton, L.J., says (pp. 438, 439):—

“A solicitor is a person who does professional work for his client just as other professional persons might. His position differs from theirs in two respects only, viz., in that he comes under the Solicitors Act and is subject to the disciplinary powers of the Court.”

That this is the understood and well-settled practice of the Court is shewn by reference to two text-books of the highest authority: Roscoe’s *Nisi Prius*, 18th ed., p. 507, where it is stated, “In point of practice a verdict is almost always taken subject, as to amount, to taxation by the proper officer.” See also Cordery’s *Solicitors*, 3rd ed., p. 347, where it is said: “Where a bill has been delivered more than twelve months taxation will not be ordered under the

Solicitors Act in the absence of special circumstances, but the reasonableness of the bill, if disputed, may still be ascertained by a reference to the taxing Master or otherwise, either in an action on the bill, or on proof in administration proceedings.”

The sole authority that seems to throw any doubt upon the position is the case of *Jones & Son v. Whitehouse*, [1918] 2 K.B. 61, where a motion was made for judgment upon a specially endorsed writ, and the defendant attacked certain specific items of alleged overcharge, suggesting that these were sufficient to constitute special circumstances under the Solicitors Act, and that upon taxation the one-sixth rule should apply. The plaintiff took the attitude that as to items calling for explanation the Judge might review or have these taxed by the taxing Master, but this would not be a taxation under the Act so as to make the one-sixth rule applicable. Pickford, L.J., says (p. 64):—

“What is the position apart from the Act? At one time it seems that the common law Courts would not have allowed an objection to the reasonableness of the items to be taken at *nisi prius*. That cannot be said to be the law since the decision in *In re Park*,” and in the result he thought that justice was being done by directing an inquiry apart from the Solicitors Act into the particular items that were objected to.

I do not regard that case as departing from or in any way qualifying the law laid down in the earlier cases to which I have referred.

Turning to the facts of this case, one of the bills, the main one, has no itemised charges, and in this case a lump charge of \$1,200 is made. In another of the bills the charges are partly itemised but not entirely so. Under the English law the action would be dismissed because the bills are not in conformity with the Solicitors Act. Under our Solicitors Act, as now amended,* these bills are proper, but the Court or the Taxing Officer has authority to direct proper itemisation, and to tax the bills as thus supplemented, instead of dismissing the action. The client appears to be a man of very limited business ability, and no knowledge of the law. On receiving the bills he realised, as he thought, his inability

* By the Solicitors Amendment Act, 1920, 10 & 11 Geo. V. ch. 45, sec. 2, an amendment was made to sec. 34 of the principal Act, R.S.O. 1914, ch. 159, by adding the following as subsec. 3:—

(3) A solicitor's bill of fees, charges, or disbursements shall be sufficient in form if it contains a reasonable statement or description of the services rendered, with a lump sum charge or charges therefor, together with a detailed statement of disbursements, and in any action upon or taxation of such a bill if it is deemed proper further details of the services rendered may be ordered.

App. Div.

1925.

ARNOLDI
v.

TREMAINE.

Middleton,
J.A.

App. Div.
1925.

ARNOLDI
v.
TREMAINE.
Middleton,
J.A.

to pay, and expected some substantial concession by way of compromise; but nothing definite was done, and the year slipped by during which he could have had taxation as of right, he not knowing anything of his rights, or the limitations upon them. I do not suggest that the charges are excessive. They are large, and it appears to me proper that before a solicitor should be allowed to recover in respect of such demands as those made in this action he should prove his case in some satisfactory way before some one competent to pass upon the value of his services.

It is not without significance that, while under the earlier practice solicitors' fees were regulated by an arbitrary and fixed tariff, they are now, in substance, dealt with on the footing of *quantum meruit*, and it is going very far to permit a solicitor to recover without any criticism the amount he assesses as the value of his services, most of the services being rendered in the absence of his client, and being of such a nature as to preclude the client forming any proper judgment as to their real worth.

Another matter that must not be lost sight of is the difficulty in which a client is placed when the bill is rendered in the form of a lump charge. All the earlier cases emphasising the necessity of itemised charges proceed upon the ground that these are necessary to enable the client to obtain intelligent advice. When a lump charge system is adopted, it is obvious that it would be almost impossible for the client to obtain any proper advice as to the propriety of the amount claimed.

It appears to me that the matter is one that largely rests in the sound exercise of discretion by the trial Judge; and, in the circumstances of this case, I am not only not convinced that there has been any miscarriage, but I am quite convinced that a taxation is necessary "to enable justice to be done."

The appeal, in my opinion, should be dismissed. Costs will follow the event but will be set off *pro tanto* against the debt.

MASTEN and SMITH, JJ.A., agreed with MIDDLETON, J.A.

RIDDELL, J.:—This is an action upon certain bills of costs, commenced by a specially endorsed writ against the defendant, Tremaine, who files an affidavit asserting that he has paid in full and that the charges are gross and excessive, and asking the preparation and delivery of an itemised bill of costs and taxation thereof by the Senior Taxing Officer.

The case came down for trial before Mr. Justice Rose at Toronto, on the 7th April, 1925, and after hearing considerable evi-

dence the learned Judge gave judgment referring the bills in the two cases mentioned to the Taxing Officer at Toronto to tax and report—further directions and costs were reserved until after report. The plaintiff now appeals and contends that no order for taxation should have been made.

The first of the bills was rendered in 1921 and the other in May, 1923, and no order to tax was taken out under the Solicitors Act, R.S.O. 1914, ch. 159.

The plaintiff argued that this case was covered by that Act, sec. 36 (1), which reads as follows:—

“36.—(1) No such reference shall be directed upon application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made.”

This section is substantially the same as the provision in that regard in the English Solicitors Act (1843), 6 & 7 Vict. ch. 73, sec. 37, and that was believed to carry out the practice of the Court up to that time.

Originally, where the party chargeable had omitted to get a bill taxed, he was not allowed when he came to trial to discuss the reasonableness of the items. As Lord Mansfield said in the case of *Williams v. Frith* (1779), 1 Doug. 198:—

“The client has a summary way of trying the reasonableness of the items in an attorney’s bill, by a reference to the Master. If he waive that method, and put the attorney to his action, I never suffer him to go into a discussion of the items, at the trial of the cause.”

In the case of *Hooper v. Till* (1779), 1 Doug. 198, at p. 199, the same learned Chief Justice said:—

“The bill of an attorney cannot be taxed at the trial of an action brought upon it.”

In the case of *Anderson v. May* (1800), 2 B. & P. 237, Lord Eldon, C.J., held that, where an action had been brought, the bill rendered was conclusive as to the reasonableness of the charges, it being the defendant’s own fault that the bill had never been taxed.

The Solicitors Act prevents a reference of a bill such as this to taxation under the provisions of that Act, but that is by no means conclusive.

In the case of *Allen v. Jarvis* (1869), L.R. 4 Ch. 616, it was held that where a solicitor brings in a bill against the executor,

App. Div.

1925.

ARNOLDI
v.

TREMAINE.

Riddell, J.

App. Div.

1925.

ARNOLDI
v.

TREMAINE.

Riddell, J.

even although the deceased has not obtained an order for taxation, the persons beneficially entitled may have the matter investigated, but that an order referring it for taxation generally was not proper, the right course being to direct the taxing Master to state whether any of the items objected to were fair and proper to be allowed and to what amount.

This case seems to have substantially followed in the later decisions, and the rule has been laid down that, even although taxation is no longer possible under the Solicitors Act, the Court may, if the solicitor has sued a client upon the bill or claimed for its amount in the administration of the client's estate, refer the bill to a taxing Master for the purpose of investigating the reasonableness of its charges. This depends upon the inherent and necessary jurisdiction of the Court.

In *In re Park*, 41 Ch. D. 326, at p. 334, Stirling, J., says:—

“I cannot believe that the very eminent Judges whose decisions have been referred to ever meant to lay down as an absolute rule that under no circumstances could the bill be looked into after the period for taxation had elapsed. . . .

“It appears to me that the Judges treated the non-taxation of the bill within the year after its delivery as an admission by the defendant that the bill was a reasonable one and was due; but an admission which, like every other admission, could be explained by evidence as to the circumstances under which it was not taxed, or as to the amount of the bill.”

The learned Judge goes on to quote the remarks of Lords Justices James and Cotton in *Ex p. Ditton*, 13 Ch.D. 318, 319.

The same learned Judge, at pp. 331 and 332, lays down the principle which has always since been followed:—

“Now, in dealing with solicitors' costs, the Court has a three-fold jurisdiction. First, the statutory jurisdiction conferred by the Solicitors Acts. That jurisdiction does not, I think, come in question at all in the present case, because it is admitted that the bills were all delivered more than a year before the testator's death, and that there are no special circumstances to entitle the executor to require taxation under the provisions of that Act.

“Secondly, the Court has, I apprehend, jurisdiction to deal with solicitors' bills of costs under its general jurisdiction over the officers of the Court. That, again, does not seem to me to be applicable to the present case, and I should dismiss it by so saying, had it not been contended before me that such a jurisdiction does not exist. I desire to be understood as not in any way assenting to that argument, which appears to me, as at present advised, to be

contrary to what is laid down by each of the learned Judges who constituted the Court of Appeal in the recent case of *In re Johnson and Weatherall* (1888), 37 Ch.D. 433, in which case, although undoubtedly the question was not argued out, the Court made an order for taxation of part of a bill of costs: an order which could not have been made under the Solicitors Act, but which the learned Judges made in the exercise, as they stated, of the general jurisdiction of the Court.

“Then, thirdly, there remains the ordinary jurisdiction of the Court in dealing with contested claims.”

This is substantially the principle mentioned in Halsbury's Laws of England, vol. 26, p. 780, para. 1287.

However, the learned Judge points out that in a taxation of this kind the bill was not referred generally for taxation, but the inquiry ought to be limited to the question whether the items objected to were or were not allowed as proper charges to be made by the solicitors. This view was supported by the Court of Appeal, composed of such eminent Lords Justices as Cotton, Lindley, and Fry.

In the case of *Lumsden v. Shipcote Land Co.*, [1906] 2 K.B. 433, at p. 438, Stirling, L.J., said:—

“It is within the jurisdiction of the Court to order that the items of a claim shall be gone into before a referee This principle is acted on constantly in the Chancery Division by a direction that bills which cannot be ordered to go before a taxing Master for taxation should be referred to him for modification, and not for taxation in the ordinary sense.”

In the case of *Jones & Son v. Whitehouse*, [1918] 2 K.B. 61, the rule is laid down that where a solicitor sues by a specially endorsed writ to recover the amount of a bill of costs, which has been delivered more than twelve months before action brought, and applies for leave to sign final judgment, the defendant, in the absence of special circumstances entitling him to have the bill taxed under sec. 37 of the English Solicitors Act, is not entitled, upon shewing a reasonable ground of objection to a few only of the items in the bill as being unreasonable in amount, to have the whole bill taxed; but the Court, in the exercise of its general jurisdiction, will give leave to defend as to the items objected to so as to have those items inquired into by taxation or otherwise.

Pickford, L.J., in discussing the various contentions, held that, no special circumstances having been shewn, taxation of the bill could not be obtained under the Solicitors Act, but he held that that did not conclude the matter, as was shewn by the case of *In re*

App. Div.

1925.

ARNOLDI
v.

TREMAINE.

Riddell, J.

App. Div. *Park*, 41 Ch.D. 326, already mentioned, but that the defendant
1925.
ARNOLDI
v.
TREMMAINE. of items specified by the defendant as being extravagant, and
Riddell, J. thereby shewing plausible ground of defence as to them.

It is true that the *Jones* case was one in which a summons had been taken out for leave to sign final judgment, and the defendant through his solicitor asked that the bill should be referred for taxation. The Registrar refused this leave, and directed judgment for the amount claimed. The bill being taken to a Judge in Chambers, the defendant made an affidavit in which he alleged generally that the charges in the bill were excessive and unreasonable and specified some three items. The Judge dismissed the appeal, and upon the matter coming before the Court of Appeal his decision was affirmed.

The present case is not precisely the same in point of practice, but I can see no difference in principle. In either case the plaintiff asks for judgment, and the defendant desires to have the bill taxed, that being the only ground of defence.

I think that in the present case we should follow the *Jones* case, just cited, and refuse the order for taxation generally such as has been ordered.

Nor can I see any allegation of any particular items which are unreasonable or extravagant, nor is there any plausible ground of defence shewn so as to come within the purview of the judgment in the *Jones* case.

I think, therefore, that the learned Judge was wrong in his direction, and that we ought to set aside the judgment of reference and direct judgment for the plaintiff for the amount sued for, with costs here and below.

The case of *Storer & Co. v. Johnson*, 15 App. Cas. 203, does not, as it seems to me, modify the principle of the cases which I have cited. Lord Halsbury, L.C., at p. 206, says:—

“And I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the

Court could exercise its own jurisdiction in the way it might think fit."

But, while the Court has undoubted jurisdiction to deal with its officers, including solicitors, the cases which I have cited indicate how this control will be exercised and to what extent.

Appeal dismissed (RIDDELL, J., dissenting).

App. Div.

1925.

ARNOLDI
v.

TREMAINE.

Riddell, J.

[RIDDELL, J.]

RE NATIONAL TRUST CO. AND McLAUGHLIN.

June 9.

1925.

Trusts and Trustees—Surviving Trustee—Appointment by, of Trust Company as Trustee in his Stead—Invalidity—Trustee Act, sec. 4 (1), (2)—Loan and Trust Corporations Act, sec. 20—Appointment by Order of Court nunc pro tunc.

By the will of J., his brother and son were appointed executors and trustees, and were given power to sell and convey the testator's real estate. The son and brother administered the estate until the death of the brother. The son then, desiring to be discharged from the trust, executed a document under seal, purporting to appoint a trust company sole executor and trustee, and transferred to the company all the property of the estate. No person was nominated in the will for the purpose of appointing new trustees:—

Held, that, under sec. 4(1) of the Trustee Act, an appointment may be made by the surviving or continuing trustee in the place of the trustee desiring to be discharged; but the section does not contemplate the appointment by the surviving trustee of some one in his own stead; and sec. 20 of the Loan and Trust Corporations Act does not authorise the appointment by a trustee, but only by the Court. The appointment was, therefore, invalid.

In order to overcome the difficulty, the Court exercised the power given to it by sec. 4(2) of the Trustee Act and sec. 20 of the Loan and Trust Corporations Act, and appointed the trust company sole trustee under the terms of the document executed by the son, *nunc pro tunc*.

APPLICATION by the National Trust Company, vendor, under the Vendors and Purchasers Act, for an order declaring that the objection made by J. N. McLaughlin, purchaser, to the vendor's title, was invalid.

June 8. The application was heard by RIDDELL, J., in the Weekly Court, Toronto.

W. B. Milliken, K.C., for the vendor.

Hugh J. McLaughlin, for the purchaser.

June 9. RIDDELL, J.:—The late J. J. died in 1898, having made his last will and testament, whereby he appointed his son

Riddell, J. E. H. J. and his brother C. B. J. "to be executors and trustees of this my will," and he continues: "I give to my said trustees full power to sell and convey my real estate when they deem it prudent and advisable to do so."

1925.
RE
NATIONAL
TRUST CO.
AND
McLAUGHLIN.

Letters of probate were issued to E. H. J. and C. B. J., and they administered the estate until the death of C. B. J. in June, 1921. Thereupon E. H. J. desired to be discharged from all of the trusts and powers reposed and conferred on him under and by virtue of the said will of J. J., and by a memorandum of agreement bearing date the 26th October, 1921, he, amongst other things, made an appointment under seal of the National Trust Company Limited "as the executor and trustee of the said last will and testament of the said late J. J." He also transferred all the property of the estate to the said trust company, these transactions being with the full assent and concurrence of all the adult beneficiaries.

The National Trust Company took possession of the estate and sold a considerable part of it. Recently they have sold part of the estate to J. N. McL., one of the parties hereto.

McL. takes the objection that the appointment of the trust company as sole trustee is not valid, and an application is made to me under the Vendors and Purchasers Act for a declaration in that regard.

The vendor, of course, relies upon the Trustee Act, R.S.O. 1914, ch. 121, sec. 4(1), which is as follows:—

"4.—(1) Where a trustee either original or substituted dies or remains out of Ontario for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, the person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may by writing appoint another person or other persons to be a trustee or trustees in the place of the trustee dying, remaining out of Ontario, desiring to be discharged, refusing or being unfit or incapable."

This is a case of a trustee desiring to be discharged from the trusts and powers reposed in him by the will, and no person is nominated for the purpose of appointing new trustees in the will, and consequently the latter part of the subsection applies—that is, the appointment is to be made in writing by "the surviv-

ing or continuing trustees or trustee for the time being," and the appointment is to be made by a trustee in the place of the trustee desiring to be discharged.

The surviving trustee is the trustee living after the death of another. The continuing trustee is the trustee continuing to exercise the function of a trustee after some other has retired. In the present case E. H. J. would be a surviving or continuing trustee; and he, no doubt, would have the power of appointing a trustee in the room of C. B. J., but the subsection does not contemplate the appointment by him of some one in his own stead, because in that case he would not be a continuing trustee at all.

There is another difficulty in the way. The vendor refers to the Loan and Trust Corporations Act, R.S.O. 1914, ch. 184, sec. 20; but that section does not authorise the appointment by a trustee but only by the Court or Judge. The case of *In re Moxon*, [1916] 2 Ch. 595, does not assist. The Public Trustee Act in England (1906), 6 Edw. VII. ch. 55, by sec. 5 gives the power not only to the Court but also to other persons to appoint the Public Trustee "as if he were a private trustee." Nothing of that kind appears in our Act.

I think these are two objections to the appointment which has been made, but the difficulty is easily gotten over. The Trustee Act, by sec. 4 (2), gives the Court power to appoint a new trustee in substitution for another existing trustee, and the Loan and Trust Corporations Act, by sec. 20, gives the Court or Judge power to appoint a company to act as trustee or executor, and the latter Act, by sec. 20 (2), allows the appointment of the company to be a sole trustee, notwithstanding that but for this Act it would be necessary to appoint more than one trustee.

I think that I should exercise the power given by these Acts and now appoint the trust company sole trustee under the terms of the indenture of the 26th October, 1921, and *nunc pro tunc*. The vendor will pay the costs.

Riddell, J.

1925.

RE
NATIONAL
TRUST CO.
AND
McLAUGHLIN.

[APPELLATE DIVISION.]

1925.

JAMES V. CITY OF TORONTO.

June 10.

Municipal Corporations—Land Owned by City Corporation Adjacent to Travelled Highway—Dangerous Condition—Trap—Injury to Persons Travelling in Motor Vehicle — Liability of Corporation as Landowner—Vehicle Driven by Boy under 18 Years not Licensed under Motor Vehicles Act—Sec. 13 of Act as Enacted by 7 Geo. V. ch. 49, sec. 10—Whether Vehicle Trespasser upon Highway—Statutory Liability to Repair.

The plaintiffs were being driven in a motor car upon a highway in a city, when, in order to continue their journey, they attempted to cross the tracks of a street railway, which were at that point not laid upon the travelled highway, but upon land owned by the city corporation, adjacent to the travelled highway. The place of crossing was in a dangerous condition—not known to the plaintiffs or their driver—by reason of the tracks not being ballasted but simply resting upon exposed sleepers. The car was imprisoned there and run into by a street car and the plaintiffs were injured and the car damaged:—

Held, that the city corporation were liable in damages for the injuries. The place was no part of the travelled highway as to which the obligation to repair existed. The liability arose from the construction of a trap, or concealed danger, into which the plaintiffs fell by reason of the absence of proper steps to protect it; and this was a liability which extended to all persons actually using the highway.

The car was being operated by the plaintiffs' son, a boy of seventeen years, who had not obtained the necessary license under the provisions of the Motor Vehicles Act, sec. 13 (as enacted in 1917 by 7 Geo. V. ch. 49, sec. 10); and it was argued that the vehicle was a trespasser upon the highway, and that the plaintiffs could not, therefore, recover in the action:—

Held, assuming that the vehicle was a trespasser, that the city corporation were not thereby, as against the plaintiffs, absolved from the duty to keep their property adjacent to the highway from being a source of danger to the public by reason of its condition; and the effect of non-compliance with the Motor Vehicles Act upon the purely statutory liability of a municipality to repair was left open for consideration in some future case.

Godfrey v. Cooper (1920), 46 O.L.R. 565, and other cases, referred to.

An appeal by the defendants the Municipal Corporation of the City of Toronto from the judgment of Mowat, J., at the trial of an action for damages for personal injuries sustained by the plaintiff William James and for injury to his motor car and for personal injuries sustained by the plaintiff Clara James, who was a passenger in the motor car, by the car being run into by a street car of the defendants the Toronto Transportation Commission, upon a highway in the city. The plaintiffs charged negligence on the part of the defendants or one of them. The trial Judge directed judgment to be entered dismissing the action as against

the Commission and awarding the plaintiff William James \$600 damages and the plaintiff Clara James \$2,000 damages against the city corporation.

App. Div.

1925.

JAMES

v.

CITY OF
TORONTO.

February 13. The appeal was heard by LATCHFORD, C.J.,
MAGEE, MIDDLETON, and ORDE, JJ.A.

G. R. Geary, K.C., and H. H. Johnston, for the appellants.

G. T. Walsh and A. W. Burt, for the plaintiffs, respondents.

June 10. MIDDLETON, J.A.:—An appeal from the judgment of Mr. Justice Mowat in an action based upon an accident occurring in September, 1923, at or near the Dundas street bridge in the city of Toronto.

The place where the unfortunate accident took place was one of extreme danger. Dundas street, running westerly, crosses a ravine by a bridge. The street railway tracks along Dundas street are in the centre of the road. The westbound traffic normally passes along the roadway to the north of these tracks. When the ravine is reached, the roadway is diverted to the south, and is carried across the bridge. The railway tracks are diverted to the north and carried across a railway bridge, land to the north of the highway having been acquired by the city corporation for that purpose. The tracks as they left Dundas street and went to the north were not ballasted, but simply rested upon exposed ties upon some foundation. As the diversion of the tracks from the highway was at a very slight angle, it was quite easy for one proceeding westerly on the travelled road to fail to appreciate the necessity of crossing the tracks, and turning to the south to continue along the travelled highway, and to find himself in a trap upon the approach to the bridge, and upon the exposed railway ties. This is precisely what happened upon the occasion in question. The plaintiffs, husband and wife, were being driven westerly, and, entering this trap, their car was imprisoned and immediately run into by a street car. The learned trial Judge has found that the accident was solely attributable to the condition described, and that this condition constituted negligence upon the part of the defendants the municipal corporation. With these findings we agree.

It appears that the car was being operated by the plaintiffs' son, a young man, seventeen years of age, who had not obtained the necessary license under the provisions of the Motor Vehicles Act. This is relied upon by the defendants as a defence to the action. That Act provides, by sec. 13 (as enacted in 1917 by 7

App. Div.

1925.

JAMES

v.

CITY OF
TORONTO.Middleton,
J.A.

Geo. V. ch. 49, sec. 10*): "No person under the age of sixteen years shall drive a motor vehicle, and no person over the age of sixteen years and under the age of eighteen years shall drive a motor vehicle on the highway unless and until such person has passed an examination and obtained a license" The fact that the driver of the car was under eighteen, and had no license, it is said, makes the vehicle a trespasser upon the highway, and so precludes recovery.

Sercombe v. Township of Vaughan (1919), 45 O.L.R. 142, was an action arising from the operation of a motor vehicle upon the highway in contravention of the provision of the statute which prohibits a vehicle upon the highway having a greater width than 90 inches, the vehicle having an actual width of 96 inches. This vehicle broke through a bridge. Its owner sued the municipality, but failed because "the plaintiff had no right to have such a vehicle on the highway at all, and in respect thereof he was a mere trespasser, the corporation owing him no duty except to refrain from setting traps for him and from maliciously and wilfully injuring him, and he must take the road as he finds it." This is taken from the judgment of Mr. Justice Riddell, which I unhesitatingly accept as an accurate statement of the law, but before it can be said to govern this case it must be determined that the breach of the statute existing here made the plaintiffs and their car trespassers upon the highway.

In the case of *Godfrey v. Cooper* (1920), 46 O.L.R. 565, the driver of a motor car, carrying passengers for hire, was not licensed as required by the Act. It was held by the majority of the Court that this did not deprive the driver of the car of any right of action that he would otherwise have against any person who injured him by negligence, it not being shewn that the breach of the statutory requirement was a proximate cause of the accident. The majority of the Court entirely repudiated the idea that the absence of the license rendered the driver of the vehicle a trespasser, or so reduced his rights that other passengers on the highway owed to him only the duty which the owner of property owes to trespassers. In the course of the judgment in that case I pointed out that the question then under consideration, namely, the rights and obligations between two persons using the highway, were widely different from that which would arise in an action against a municipality for damages by reason of the nonrepair of the highway. In such case the plaintiff can only succeed if he shews that the de-

* See now sec. 44 of the Highway Traffic Act, 1923, 13 & 14 Geo. V. ch. 48, which Act came into force on the 31st December, 1923.

fendant owed a duty to him, and he fails when it appears that by reason of some fact he is not lawfully upon the highway, the obligation to repair the highway being an obligation to those lawfully upon it. I adhere to this view, but it carries the matter no further; the question yet remains whether the fact that the car was driven by an unlicensed chauffeur makes its presence upon the highway unlawful.

Meredith, C.J.C.P., who dissented from the other members of the Court, took the view that the absence of the license made the operation of the car unlawful and the driver a trespasser against all those lawfully upon the highway. In *Buck v. Eaton* (1919), 17 O.W.N. 191, he expressed the same view.

In *Roe v. Township of Wellesley* (1918), 43 O.L.R. 214, my Lord the Chief Justice of this Court, sitting alone, determined that the infancy of the chauffeur, and the fact that he had no license, precluded recovery; the young man being prohibited, by statute, from driving a motor car, the use of the highway which he was making was unlawful, and, therefore, no cause of action existed. As there pointed out, this view is not in accordance with the opinion of the Supreme Court of Saskatchewan in the case of *Etter v. City of Saskatoon* (1917), 39 D.L.R. 1. On the other hand, the Supreme Court of Nova Scotia, in *Sampson v. Robertson*, [1925] 1 D.L.R. 624, while agreeing with the decision in *Godfrey v. Cooper* (*supra*), also emphasises the view that the question in the case then in hand, which was similar to that in *Godfrey v. Cooper*, was very different from the question which would have to be determined in an action against a municipality for nonrepair; the obligation to repair being confined to those who were lawfully upon the highway.

The case before us does not, I think, fall to be determined upon the basis of the liability of the municipality for the repair of the highway, but rather upon the duty of a landowner to keep his property adjacent to the highway from being a source of danger to the public by reason of its condition. It is not entirely clear from the evidence whether the place where the accident happened is upon the actual 66 feet constituting the normal highway, or whether it is upon adjacent land taken for the purpose of the construction of the railway bridge, which is not upon the line of the highway. It is quite clear that this place formed no part of the actual travelled way as to which the obligation to repair existed, but is rather in the position of a dangerous place immediately adjoining the travelled highway, and the liability of the city corporation arises from the construction of a trap, or concealed

App. Div.

1925.

JAMES

v.

CITY OF
TORONTO.

Middleton,

J.A.

App. Div.

1925.

JAMES
v.CITY OF
TORONTO.Middleton,
J.A.

danger, into which the plaintiffs fell by reason of the absence of proper steps to protect it. I think that this is a liability which extends to all persons actually using the highway, and is not of that narrower type of liability imposed upon the municipality, referred to in the cases which I have quoted. If the defendants had been the owners of the land adjoining the highway, and had left a pit unfenced into which one travelling upon the highway fell, without negligence on his part, it would not then lie in the defendants' mouth to question the legality of the user of the highway, and I agree with what is said by Sir Frederick Pollock, in the 12th edition, p. 530, of his work on Torts, that the tendency of the Court is, and ought to be, toward the enforcing of the broad and wholesome rule of public policy which imposes liability upon all persons undertaking works involving danger to the public and to discourage minute objections.

For this reason, I think the appeal should be dismissed, recognising that this still leaves open for further consideration the effect of non-compliance with the Motor Vehicles Act upon the purely statutory liability of a municipality to repair.

LATCHFORD, C.J., and MAGEE, J.A., agreed with MIDDLETON, J.A.

ORDE, J.A., agreed in the result.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1925.

BANK OF TORONTO v. BENNETT.

June 10. *Promissory Note—Waiver of Protest by Endorser—Notice that Note Unpaid at Maturity Given Orally by Payee—Promise of Endorser to Pay and Request to Do Nothing — Waiver in Favour of all Holders.*

The defendant, the endorser of a promissory note which was not paid at maturity, on being told, over the telephone, by the president of the company to which the note was payable, that the note had not been paid and asked what to do with it, said not to do anything—"I will pay it, I will settle it:"—

Held, that the defendant had waived protest.

Britton v. Milsom (1892), 19 A.R. 96, followed.

Held, also, that waiver in favour of the payee is sufficient in favour of all holders.

Rabey v. Gilbert (1861), 30 L.J.Ex. 170, followed.

The rule as to the admissibility and effect of conversations conducted by telephone stated in 27 Am. & Eng. Encyc. of Law, 2nd ed., p. 1041, adopted.

AN appeal by the defendant from the judgment of the First Division Court of the County of York in favour of the plaintiffs in an action upon a promissory note.

June 5. The appeal was heard by RIDDELL, J., MIDDLETON and MASTEN, JJ.A., and WRIGHT, J.

D. O. Cameron, for the appellant.

R. S. Robertson, K.C., for the plaintiffs, respondents, referred to *Britton v. Milson* (1892), 19 A.R. 96; *Falconbridge on Banking and Bills of Exchange*, 3rd ed., p. 758, and cases there cited.

June 10. The judgment of the Court was read by RIDDELL, J.:—A promissory note for \$300, dated the 10th January, 1924, in favour of the Star K.M. Co. Ltd., payable 4 months after date, was made by the Harris company and A. Harris, and endorsed by the defendant: this was endorsed over to the Bank of Toronto for collection. On the maturity of the note, it not being paid, the bank so notified the payees, and Miss D., the bookkeeper of the Star K.M. Co., as she swears, called up the defendant. He asked if the note had been protested, and she said she did not know, but she would inquire of the bank. She did so and tried to get the defendant again on the telephone, but was told that he was not in. She communicated this to Addleburg, the president of the Star K.M. Co., and he, as he swears, called up the defendant on the telephone, told him that the note had not been paid, and asked him what to do with it; the defendant said not to do anything—"I will pay it, I will settle it." As Addleburg puts it in another place, "he said we should not do anything till he came back from Montreal, and then he would settle, he would pay it."

The defendant denies that he had any conversation with Miss D. or Addleburg. "I never spoke to any one in connection with the matter;" he says that "he was out of town at the time." He produces no diary or anything to shew where he was; nor has he any corroboration of any kind; he says that his stenographer was talking to them, but does not even produce her at the trial.

Nor was there any cross-examination of Miss D. or Addleburg as to how they knew it was the defendant to whom they were speaking.

The learned Division Court Judge, his Honour Judge Morson, upon this evidence was satisfied that the defendant was mistaken, but counsel for the defendant said: "I would like to put in evidence as to the negotiations that took place between the Bank of Toronto and my client . . . my client has not tried to get out of the payment of this note. In the course of these nego-

App. Div.

1925.

BANK OF
TORONTO
v.
BENNETT.

App. Div.

1925.

BANK OF
TORONTO

v.

BENNETT.

Riddell, J.

tiations he kept on saying he would pay as soon as he could." He was allowed to call evidence, the manager of the bank, and he swore to several conversations with the defendant, and that in presence of a witness named, "and we had quite a long talk with Mr. Bennett, and he said he would pay the note, and we said that was fine; we would be quite willing to wait as long as he would say, so we let it go at that." Then he swears that he did not put the note in the hands of the solicitor because the defendant "kept on saying he would pay."

The defendant says that he had acknowledged his moral obligation to pay the note and said he would pay as soon as he could—that he gave the bank-manager a note for \$25; and that he always intended to pay from the beginning.

The learned Judge says: "I find on the evidence that the defendant promised to pay the debt and waived protest."

The defendant appeals on the grounds:—

(1) That the learned Judge at the trial erroneously admitted the evidence of all the witnesses for the plaintiffs as to conversations by telephone with the defendant, without sufficient proof that the conversation was actually with the defendant and not with some one else.

(2) That the said judgment was contrary to law and evidence and the weight of evidence.

As to the first ground, there was no exception taken to the evidence and there could not be.

The whole question of evidence of conversations by telephone is elaborately gone into by the very learned author in *Wigmore on Evidence*, secs. 222, 413, 659, 660, 2155, with a full reference to the cases. It will be sufficient to mention *Warren Gzowski & Co. v. Forst & Co.* (1911), 24 O.L.R. 282; *S.C.* (1912), 46 Can. S.C.R. 642; *Fidelity Oil and Gas. Co. v. Janse Drilling Co.* (1916), 27 D.L.R. 651 (see especially at pp. 656, 659).

The rule is accurately stated in 27 *Am. & Eng. Encyc. of Law*, 2nd ed., p. 1041: "Conversations conducted through the medium of a telephone do not differ in their essential characteristics from other verbal communications; their admissibility and effect as evidence are . . . governed by the same general legal principles which apply in case of ordinary oral declarations. The instrument merely enables the parties to carry on their conversation at greater distances than under ordinary" (I should substitute "some other" for "ordinary") "circumstances."

There is ample evidence to justify the conclusion of the learned Judge, irrespective of the conversations with the bank-manager.

The law is quite settled that such a promise as was made by the defendant to the president of the payee company is a waiver of protest. In *Britton v. Milsom*, 19 A.R. 96, Osler, J.A., collects and discusses the cases. See, in addition to *Britton v. Milsom*, *Phipson v. Kneller* (1815), 4 Camp. 285; *Burgh v. Legge* (1839), 5 M. & W. 418; *Cordery v. Colville* (1863), 32 L.J.C.P. 210; *Woods v. Dean* (1862), 32 L.J. Q.B. 1. And waiver in favour of the payee is sufficient in favour of all holders: *Rabey v. Gilbert* (1861), 30 L.J. Ex. 170. No useful purpose would be served by a discussion of these and other cases.

App. Div.

1925.

BANK OF
TORONTO
v.

BENNETT.

Riddell, J.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

HUFFMAN v. ROSS.

1925.

June 10.

Partnership — Firm of Stockbrokers — Retirement of one Member of Firm — Continuance of Business by Remaining Member in Firm Name — Bankruptcy — Claim Made by Customer upon Bankrupt Estate in Respect of Dealings after Retirement—Whether Amounting to Election—Attempt to Hold Retired Partner Liable—Estoppel—Implied Representation—Knowledge of Untruth—Notice to Customer, whether Necessary.

R., who was a member of the firm of B. & Co., stockbrokers, retired from the firm in May, 1920. The business was continued by B. alone, under the same firm name. The plaintiff became a customer of the firm in March, 1920, and continued to deal with the firm until it became bankrupt. The plaintiff filed a claim under the Bankruptcy Act against the insolvent estate of B. & Co.; but, so far as appeared, received no dividend upon his claim. In this action he sought to recover from R. the amount of his claim against the firm, alleging that at the time his claim arose he was not aware of the retirement of R.:—

Held, that the only claim made in bankruptcy was against B., the then sole member of the firm, and that was not inconsistent with a claim against both B. and R. as members of the firm; there was, therefore, nothing to raise an election, nor in fact was there an election.

A partnership must not be looked upon as a single individual, liable as such, but as composed of partners each of whom is liable.

Scarf v. Jardine (1882), 7 App. Cas. 345, distinguished.

The liability, if any, of R. was based upon estoppel, arising from the fact that R., while a partner, necessarily gave B. authority to conduct business in the firm name; and the plaintiff, being an old customer, had a right to believe that that authority continued until he was told that it was revoked.

In order to create an estoppel *en pais*, it must be shewn that he who desires to take advantage of it has acted upon the untrue representation as true. not knowing it to be untrue, thereby altering his position to his prejudice.

1925.
 ———
 HUFFMAN
 v.
 ROSS.

In this case the plaintiff failed to satisfy the Court that he did not know that R. had retired from the firm before 1922, when the dealings upon which the plaintiff's claim was based were had. The plaintiff, therefore, had not established an estoppel.

The dealings upon which the claim was based being about two years after the retirement of R., and having no necessary relation to the business which the plaintiff had with the firm before the retirement, *quære*, whether notice to the plaintiff was necessary.

AN appeal by the plaintiff from the judgment of the County Court of the County of York (DENTON, Jun.Co.C.J.) dismissing an action brought by a customer of the stockbroking firm of J. G. Beaty & Co. to recover from the defendant, as a member or ostensible member of the firm, the amount due to the plaintiff by the firm, which had become bankrupt.

June 5. The appeal was heard by RIDDELL, J., MIDDLETON and MASTEN, JJ.A., and WRIGHT, J.

F. H. Phippen, K.C., for the plaintiff, appellant.

G. W. Mason, K.C., for the defendant, respondent.

The points discussed in the argument are indicated in the judgment.

The following authorities were referred to: *Scarf v. Jardine* (1882), 7 App. Cas. 345, 357; Halsbury's Laws of England, vol. 13, p. 365, vol. 22, p. 14; *Wood v. Duke of Argyll* (1844), 6 Man. & G. 928, 932; *Wright v. Fonda and Higgins* (1891), 44 Mo. App. 634, 644; Lindley on Partnership, 9th ed., p. 79; *Hart v. Alexander* (1837), 7 Car. & P. 746; *Young v. Tibbitts* (1873), 32 Wis. 79; *C. P. Reid & Co. v. Coleman Bros* (1890), 19 O.R. 93; *Wyllie v. Pollen* (1863), 32 L.J.N.S. Ch. 782; *Ex p. Adamson* (1878), 8 Ch. D. 807, 817, 818.

June 10. The judgment of the Court was read by RIDDELL, J.:—This appeal raises somewhat curious points of law, in the determination of which we are much assisted by the very able arguments of counsel upon both sides.

The facts, as found by the learned trial Judge, his Honour Judge Denton, of the County Court of the County of York, are as follows:—

“Prior to the 31st May, 1919, the firm of J. G. Beaty & Co., stockbrokers, consisted of J. G. Beaty, resident in Toronto, and one Friedlander, who resided in New York. The head-office was in New York and the Toronto office a branch. The firm owned a seat on the New York Stock Exchange, the seat being held in the name of Friedlander, the American member of the firm. On the 31st

May, 1919, the defendant Ross joined the firm and was a partner until the 31st May, 1920, on which date he retired. About a month after this retirement, Friedlander also retired, and with him went the membership in the New York Stock Exchange. Thereafter the business was carried on by John G. Beaty under the name of J. G. Beaty & Co.

App. Div.
1925.

HUFFMAN
v.
ROSS.

Riddell, J.

"The plaintiff is a dentist living in the village of Forest, in the county of Lambton. Prior to March, 1920, the plaintiff had been dealing with another firm of stockbrokers; in that month he decided to change his brokers, and, upon the recommendation of his solicitor, Mr. Charles Millar, of Toronto, he went to the firm of J. G. Beaty & Co. His business was done with one Magann, who was an employee of the firm. He never at any time had any business dealings with the defendant Ross personally. J. G. Beaty & Co. took over the business from the other firm of stockbrokers, and thereafter the plaintiff continued to deal with the firm of J. G. Beaty & Co. down to the time of the bankruptcy. . . .

"On the retirement of the defendant on the 31st May, 1920, the New York Stock Exchange was duly notified and a bulletin issued announcing the retirement, and in June, 1920, a notice of the retirement appeared in the New York Times and Wall Street Journal. These announcements, of course, would be of little use in notifying the plaintiff, a dentist in the village of Forest, Ontario. But it appears that later on, after Friedlander's retirement and after the firm had ceased to have a seat on the New York Stock Exchange, new letter-heads and stationery were got out leaving out the names of the partners and omitting the statement that they were members of the New York Stock Exchange. The plaintiff received this new stationery, but says that it did not put him on inquiry, and that he continued to believe that Ross was a member."

The new firm of J. G. Beaty & Co. became insolvent, and the plaintiff filed a claim against the insolvent firm under the Bankruptcy Act, stating that the said debtor, that is J. G. Beaty & Co., of Toronto, at the date of the authorised assignment, "was and still is justly and truly indebted to me in the sum of \$3,000," etc., making up a claim in all of \$2,818.90. There is no evidence of any dividend having been paid.

This action is now brought against Ross, the retiring partner, who was appointed Finance Commissioner and City Treasurer of Toronto in July, 1920.

His Honour Judge Denton has decided the case in favour of the defendant upon the ground that the plaintiff by filing his claim in bankruptcy against the firm J. G. Beaty & Co. has conclusively

App. Div. elected, and therefore the case of *Scarf v. Jardine*, 7 App. Cas.
1925. 345, is applicable and justifies a judgment for the defendant.

HUFFMAN
v.

ROSS.

Riddell, J.

In that view I am wholly unable to agree, for the following reasons. In *Scarf v. Jardine* there had been a firm composed of Scarf and Rogers, carrying on business, under the name of W. H. Rogers & Co., in Manchester, with which the plaintiff, Jardine, had dealings. These two persons dissolved partnership, and Rogers took another named Beech into partnership, and they carried on the same business, under the same name and at the same place, from and after the 27th July, 1877. The plaintiff, who had dealings with the old firm, without knowledge of the change furnished goods in the name of the firm in the usual way. The new firm became insolvent, and the plaintiff filed his claim against the new firm, then knowing its actual constitution and that the old firm had been dissolved. It was held that the plaintiff, having a right of action against both Rogers and Beech of the new firm upon the ground that they were the actual partners, and also against Scarf on the ground of estoppel, had elected to make the claim against Rogers and Beech.

It is obvious that a claim that Beech was liable was wholly inconsistent with a claim that Scarf was liable: it was held that the two inconsistent positions could not be taken, and that, the election having once been made to hold Beech liable, that could not be changed so as to give a claim against Scarf.

The present case is wholly different. In this case the only claim made in bankruptcy was against Beaty, the sole member of the firm, and that is not inconsistent with a claim against both Beaty and Ross as members of the old firm. Consequently there is nothing in the way of contradictory claims and nothing to raise an election, nor in fact was there an election.

Much difficulty frequently arises from the not unnatural custom of looking upon a partnership as a single individual, liable as a single individual, instead of the partners each being liable, and the learned County Court Judge seems to have fallen into this error and looked upon the old firm of J. G. Beaty & Co. as something entirely different from the new firm of J. G. Beaty & Co., which, of course, is not the case.

Were there nothing more in the case I should not hesitate to reverse the judgment, but there is a great deal more.

It is elementary that the liability, if any, of Ross is based upon estoppel. That liability, if any, arises from the fact that Ross, while he was a partner, as such necessarily gave to Beaty authority to conduct business in the firm name; and, as it is put by Lord

Blackburn in 7 App. Cas. at p. 357, the plaintiff, being an old customer, had a right to believe that that authority continued until he was told that it was revoked.

This then is, if anything, a case of estoppel *en pais*; and, in order to create an estoppel of this kind, it must be shewn that he who desires to take advantage of it had acted upon the untrue representation as true, thereby altering his position to his prejudice.

But it must be shewn that he acted on the strength of the representation, not knowing it to be untrue. "It is not sufficient that the party complaining acted in a manner consistent with the truth of the representation if it appears that he was not influenced by it:" Halsbury's Laws of England, vol. 13, p. 383, para. 541, and the cases referred to in note (o). For example, in the case of *Edmundson v. Thompson* (1861), 31 L.J.N.S. Ex. 207, Pollock, C.B., at p. 209, dismissed the action because the plaintiff had not shewn that he acted in consequence of the statement. See also *In re Fraser*, [1892] 2 Q.B. 633, at pp. 637, 638.

All this is elementary.

I have examined with very great care the evidence in this case, and I find myself in the same position as the learned trial Judge when he says: "If it were necessary to a decision of this case to make a finding upon this point, I should be inclined to say that, if the plaintiff ever knew that Ross was a partner, he acquired knowledge of his retirement some time in 1920." I wholly agree that if he really had relied upon the truth of the implied representation, it would be no answer to say that if he had thought about it he must have known it was untrue: *Bloomenthal v. Ford*, [1897] A.C. 156, at pp. 168, 170. But there is a very great deal of evidence which indicates that he did know. At all events he has not succeeded in satisfying the learned trial Judge, or myself, that he did not in any way know of Ross's retirement before 1922, when the transactions in question were had.

It is not necessary for the decision in this case, and therefore I do not decide, whether notice was necessary to this plaintiff under all the circumstances. The dealings after the change in the partnership were not for two years or thereabouts thereafter. They are separate, discrete and independent, having no necessary relation to the business which he had had with the old firm. In the case of *In re Fraser*, already mentioned, Lord Justice Kay seems to think that where a dissolution of partnership has taken place it is sufficient to notify the bankers and the principal creditors.

It might well be contended that the representation, such as it

App. Div.
1925.

HUFFMAN
v.
ROSS.

Riddell, J.

App. Div. was, of the defendant, would not be considered a continuing author-
 1925. ity in such a business as this and to a person in the position of the
 HUFFMAN plaintiff. The extent of the requirement for the retiring partner
 v. to notify the customers of the firm may have to be considered at
 ROSS. another time; but, as I have said, the question does not necessarily
 Riddell, J. arise here.

Appeal dismissed with costs.

[IN CHAMBERS.]

1925.

REX v. CHOMIK.

June 10.

Criminal Law — Magistrate's Conviction for Offence against Ontario Temperance Act — Sentence of Imprisonment — Arrest on Magistrate's Warrant — Release on Bail pending Appeal from Conviction — Re-arrest on same Warrant after Dismissal of Appeal — Warrant Exhausted — Discharge on Habeas Corpus — Criminal Code, sec. 756 — Construction of — Authority of English Decision — Time during which Defendant at Large upon Bail not Reckoned as Part of Term of Imprisonment.

The defendant was convicted by a police magistrate of an offence against the Ontario Temperance Act and sentenced to pay a fine and costs, or to be kept for three months in gaol, and in addition to be imprisoned for two months. A warrant was issued and the defendant was arrested; but he appealed and, giving security, was released the next day. He paid the fine and costs. About a month later, his appeal was dismissed; and, without further warrant, he was arrested and at once put in gaol:—

Held, that the term during which he was regularly and lawfully at large pending the appeal was not to be reckoned as part of his two months' term of imprisonment.

Rex v. Robinson (1907), 14 O.L.R. 519, and *Rex v. Taylor* (1906), 12 Can. Crim. Cas. 244, distinguished.

But the original warrant issued by the magistrate was exhausted, and in order to have a legal arrest and imprisonment it was necessary to have a new warrant.

In construing sec. 756 of the Criminal Code, the construction given to a section of the English Summary Jurisdiction Act of 1848 in substantially identical terms, in *Rex v. Governor of Pentonville Prison* (1903), 67 J.P. 206, was adopted, following *Trimble v. Hill* (1879), 5 App. Cas. 342.

And the defendant was discharged upon *habeas corpus*.

MOTION, on the return of a writ of *habeas corpus*, for the discharge of the defendant from custody under a magistrate's warrant issued pursuant to a conviction for an offence against the Ontario Temperance Act.

June 9. The motion was heard by RIDDELL, J., in Chambers.

A. A. Macdonald, for the prisoner, cited, in addition to some of the cases referred to in the judgment, *Rex v. Gray*, [1925] 1 W.W.R. 831 (Man.)

F. P. Brennan, for the Crown.

1925.
—
REX
v.
CHOMIK.

June 10. RIDDELL, J.:—Chomik was convicted on the 26th March, 1925, by Mr. K., Police Magistrate for Kenora, of a second offence under sec. 41 of the Ontario Temperance Act, and sentenced to pay a fine of \$200 and \$16.50 costs, or to be kept for three months in gaol, and in addition he was to be imprisoned for two months. A warrant was issued against Chomik, but he appealed, and, giving security, he was released the next day. He had paid the fine and costs. On the 24th April the appeal was dismissed by the District Court Judge; and, without further warrant, Chomik was arrested and put in gaol at once. He obtained a *habeas corpus per statutum tricesimo primo Caroli Secundi Regis*: and on the return before me his discharge is moved for on two grounds:—

1. That the term during which he was out on bail counts in his two months.

2. There should have been a new warrant.

In respect to the first point, my decision in *Rex v. Robinson* (1907), 14 O.L.R. 519, was cited. But that is quite a different case—there had been no warrant issued, and the going at large was, I thought, on the direction of the magistrate, and therefore it was, *quoad* the defendant, lawful. I held that, had the applicant taken any part, however small, e.g., by requesting or urging it, in procuring his release, he might well be considered guilty, but the facts shewed quite a different state of things: p. 522. The Court of Appeal, on an action being brought, *Robinson v. Morris* (1909), 19 O.L.R. 633, apparently on evidence which was not before me, held (p. 640) that “the evidence at the trial makes it perfectly clear that he was admitted to bail at his own request, or that of his solicitor, in substitution for the latter’s undertaking.” There is no inconsistency in the judgments, whatever may be the case as to dicta. It may be of no importance, but the answer to an implied query of one of the learned Judges, why I did not give effect to the Prisons and Reformatories Act, R.S.C. 1906, ch. 148, sec. 3, in respect of the time when a convict is “out on bail,” is that I did not consider him “out on bail”—the so-called recognizance to appear being a nullity.

Rex v. Taylor (1906), 12 Can. Crim. Cas. 244, I thought not in point, because it went on the ground that the defendant there

Riddell, J. was held to have known that he was improperly at large. In any case, *Rex v. Robinson*, however it should have been decided, is not of assistance here—the defendant here was on bail regularly and lawfully, and consequently the time during which he was at large does not count in his sentence.

2. The legislation must be looked at to understand the point here in dispute.

The Ontario Temperance Act (1916), 6 Geo. V. ch. 50 (Ont.), by sec. 72 provides that the provisions of the Ontario Summary Convictions Act, R.S.O. 1914, ch. 90, shall apply to every prosecution thereunder. The Ontario Summary Convictions Act, by sec. 4, provides that, *exceptis excipiendis*, Part XV. and secs. 1121, 1124, 1125, and 1142 of the Criminal Code shall be considered part of the Act.

The Criminal Code, R.S.C. 1906, ch. 146, by sec. 750 (c) (added in 1909 by 8 & 9 Edw. VII. ch. 9, sec. 2, and contained in Part XV.), provides:—

“The appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall . . . enter into a recognizance in form 51 with two sufficient sureties, before a county judge, clerk of the peace or justice for the county in which such conviction . . . has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; . . . and upon such recognizance being entered into . . . the justice before whom such recognizance is entered into . . . shall liberate such person if in custody.”

It was apparently under this section that the prisoner was released on bail.*

Then by sec. 756 it is enacted:—

“If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought.”

This is taken from the English Summary Jurisdiction Act of 1848, 11 & 12 Vict. ch. 43, which, by sec. 27, provides:—

“And be it enacted, that after an appeal against any such con-

* The Crown Attorney for the City of Toronto and County of York advises the editor that the bail was allowed under sec. 92(5) of the Ontario Temperance Act.

viction or order as aforesaid shall be decided, if the same shall be decided in favour of the respondents, the Justice or Justices who made such conviction or order, or any other Justice of the Peace of the same county, riding, division, liberty, city, borough, or place, may issue such warrant of distress or commitment as aforesaid for execution of the same, as if no such appeal had been brought."

The meaning and effect of these words (substantially identical in the English and Canadian legislation) came up for decision in the case of *Rex v. Governor of Pentonville Prison* (1903), 67 J.P. 206, before a strong court, Lord Alverstone, C.J., Darling and Channell, JJ.

There the defendant had been found guilty of an offence justiciable by summary conviction, and sentenced to two months' imprisonment. He was committed to prison, but on lodging an appeal he found bail and was released; on appeal to the Quarter Sessions, a conviction for a technically different but substantially the same offence was made, the Recorder remitted the two months originally imposed and imposed two months' imprisonment in the same prison. The defendant was forthwith arrested without a new warrant and imprisoned under the original warrant. On *habeas corpus* the defendant was released.

The case now before me is identical up to and including the appeal taken; the actual decision in the English case is not helpful by reason of the different sequel; but the interpretation by the learned Judges of the words already quoted in the statute must bind me.

In *Trimble v. Hill* (1879), 5 App. Cas. 342, the Judicial Committee said:—

"Where a colonial Legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the Courts of the Colony."

In the English Court Lord Alverstone, C.J., said (67 J.P. at p. 207):—

"The next point which I think is also fatal to this conviction is the absence of any order of commitment as made by the learned Recorder at quarter sessions or by a magistrate pursuant to sec. 27 of the Summary Jurisdiction Act, 1848. The first order of commitment was, I think, exhausted, and it is quite obvious that it was intended that there should be the act of quarter sessions or of the justices in the place of quarter sessions authorising the detention, because sec. 27 of the Summary Jurisdiction Act, 1848, says: 'After

Riddell, J.

1925.

REX
v.
CHOMIK.

Riddell, J. an appeal against any such conviction or order as aforesaid shall
 1925. be decided in favour of the respondent, the justice or justices who
 REX made such conviction or order, or any other justice of the peace
 v. of the same county may issue such warrant of dis-
 ЧОМЛК. tress or commitment for execution of the same, as if
 no appeal had been brought.”

Darling, J., contented himself with agreeing; Channell, J., said:—

“I am of the same opinion upon the point that I think the various sections of the statute—both that repealed and that substituted—contemplate a fresh commitment, and they assume that the former commitment is gone when the man is released under his recognizances. That being so, I think that this detention cannot be justified.”

Without exercising an independent judgment of my own, I follow the English Court and hold that the original warrant issued by the magistrate was exhausted, and that in order to have a legal arrest and imprisonment it was necessary to have a new warrant.

The defendant will, therefore, be released. There will be no costs.

[RIDDELL, J.]

1925.

RE STAIR AND YOLLES.

June 12. *Mortgage—Statutory Discharge—Executor—Validity—Mortgages Act, R.S.O. 1887, ch. 102, sec. 13.*

A mortgage was made to J. C. in 1884. In 1889, after the death of J. C., a discharge of the mortgage, signed by one only of three executors to whom probate of the will of J. C. was granted, was registered:—

Held, that the discharge was valid under the enactment in force at the time of the registration, sec. 13 of the Mortgages Act, R.S.O. 1887, ch. 102, also found in sec. 17 of the Trustee Act, R.S.O. 1887, ch. 110.

Ex p. Johnson (1875), 6 P.R. 225, followed.

The point did not actually arise for decision in *Re Spellman and Litovitz* (1918), 44 O.L.R. 30, 32, where doubt was expressed.

APPLICATION by a vendor of land, under the Vendors and Purchasers Act, for an order declaring that the purchaser's objection to the title was invalid.

June 11. The application was heard by RIDDELL, J., in the Weekly Court, Toronto.

J. C. Thomson, for the vendor.

C. P. Tisdall, for the purchaser.

June 12. RIDDELL, J.:—In this case the question arises as to the validity of a discharge of a mortgage made by one O. P. to the late J. C., the discharge of mortgage having been signed by only one of the three executors to whom probate of the last will and testament of the said J. C. issued. The mortgage is itself dated in August, 1884, and the discharge is dated the 21st October, 1889, and registered the same day.

Riddell, J.

1925.

RE STAIR
AND
YOLLES.

The objection seems to be based upon the doubt expressed by the learned Chief Justice of the Common Pleas in *Re Spellman and Litovitz* (1918), 44 O.L.R. 30, at p. 32. The learned Chief Justice, however, says that the point does not in fact arise in that case, and consequently he does not give a decision upon the point. It now comes up squarely for decision.

The Act in force at the time of the discharge was the Mortgages Act, R.S.O. 1887, ch. 102, secs. 12 and 13, or the Trustee Act, ch. 110, secs. 16 and 17. The latter of these sections, viz., ch. 102, sec. 13, or ch. 110, sec. 17, is in the language of the Registry Act of 1868, 31 Vict. ch. 20, sec. 62, which reads:—

“Every certificate of payment or discharge of the mortgage, or of the conditions therein, or of the lands or of any part of the same, or of any part of the money, by the mortgagee, or his assignee, his heirs, executors, administrators, or assigns, or any one of them, at whatsoever time given, and whether before or after the time limited by the mortgage for payment or performance, shall be valid if in conformity with this Act, to all intents and purposes whatsoever, as herein mentioned.”

That section was applied by Blake, V.-C., who was consulted by the learned Referee, in *Ex p. Johnson* (1875), 6 P.R. 225, and it was held that one of several executors could alone execute a valid discharge of a mortgage made to a testator.

I think it was the universal opinion of the Bar that such was the law, and I do not know of any case in which the matter had been brought in question until the case already mentioned in 44 O.L.R., where the learned Chief Justice of the Common Pleas expressed doubt without actually deciding.

Remembering that the original Act, being interpreted in 1875, was re-enacted, in the same language substantially, in 1877 and 1887 in the revised statutes of these years, I think the Legislature must be held to have considered the interpretation of Blake, V.-C., to be the correct one. I think, therefore, that the language employed in the statute is sufficient to justify one executor signing the discharge, and that a discharge when so signed is valid, and so declare. The purchaser will pay the costs, if these have not been arranged for.

[IN CHAMBERS.]

1925.

RE OLLMANN.

June 13. *Mortgage—Impossibility of Paying Mortgage-money and Obtaining Discharge—Refusal of Mortgagees to Receive Money—Right of Mortgagors to Pay—Mortgages Act, R.S.O. 1914, ch. 112, sec. 11, subsecs. 2, 3 (5 Geo. V. ch. 21, sec. 1)—“Or for some other Cause”—Ejusdem Generis Rule—Order for Payment into Court.*

Subsections 2 and 3 of sec. 11 of the Mortgages Act, added in 1915 by 5 Geo. V. ch. 21, sec. 1, were intended to be in relief of mortgagors who are in difficulty as to paying their mortgage-money and receiving a discharge, and should be given a liberal construction.

Subsection 2 authorises the making by the court of an order for payment into court of the mortgage-money by the mortgagor, where it is impossible for him to pay the money and obtain a discharge, “owing to the whereabouts of the mortgagee being unknown or for some other cause:”—

Held, that the words “or for some other cause” should not be construed as “other such like” according to the *ejusdem generis* rule, which has little if any value in statutes conferring discretionary powers upon the judiciary.

Where mortgagors were entitled to pay off their mortgage and receive a discharge, and it was impossible for them to do so by reason of the refusal of the mortgagees to receive the money, an order was made in the terms of the subsections.

APPLICATION by the mortgagors in a mortgage made in 1920 for an order, under subsecs. 2 and 3 of sec. 11 of the Mortgages Act, R.S.O. 1914, ch. 112, directing payment into Court of the principal and interest due upon the mortgage. These subsections were in 1915 added to sec. 11, by 5 Geo. V. ch. 21, sec. 1, and are set out below.

June 12. The application was heard by RIDDELL, J., in Chambers.

W. M. McClemont, for the applicants.

No one appeared to oppose the application.

June 13. RIDDELL, J.:—By a mortgage made on the 1st March, 1920, from J. F. O. and others to A. M. O. and M. O., two maiden ladies, the mortgagors agreed to pay \$15,000 and interest, the mortgage containing the following clause:—

“With the privilege to the mortgagors to pay on account of the principal, at any of the times fixed for payment of interest or principal, the sum of \$500 or any multiple thereof, in addition to the aforesaid payments, or the whole of the balance of principal money at any time, without notice or bonus.”

The times fixed for the payment of the interest were the 23rd days of February and August, beginning with the 23rd August,

1920, and the principal of the mortgage was to be paid off in equal consecutive yearly instalments of \$2,000 until fully paid, the first instalment to be paid on the 1st March, 1921.

In March, 1925, the mortgagors desired to pay off the principal and interest still due, and their solicitors wrote the mortgagees on the 13th May, 1925, to that effect. Then on the 5th April, 1925, the mortgagors wrote the mortgagees that, as their solicitors had not received an answer, they had requested them, the mortgagors, to see if they could get a reply. The mortgagors in these letters stated that they desired and intended to pay off the amount owing.

Subsequently, one of the mortgagors had an interview with the mortgagees, when they stated they would not receive the moneys owing on the mortgage.

An application is now made to me, under the Mortgages Act, R.S.O. 1914, ch. 112, sec. 11, as amended by 5 Geo. V. ch. 21, sec. 1, for an order directing payment into Court, etc.

That section provides as follows:—

“(2) Where it is impossible for a mortgagor or other person entitled to pay off a mortgage and to receive a certificate of discharge thereof to pay the principal or interest accruing due at any time on such mortgage and to obtain a proper discharge thereof, owing to the whereabouts of the mortgagee, or of one or more of several mortgagees or other person or persons entitled to receive such payment and to give such discharge being unknown or for some other cause, the court may on the application of the mortgagor, or in the case of a mortgage to more persons than one as mortgagees, on the application of one of the mortgagees, direct payment into court of such principal or interest, and by the same or a subsequent order may direct payment out to any mortgagee of the portion thereof to which he is entitled.

“(3) Payment of such money into court shall effectually exonerate therefrom the person making such payment, and when the total amount of the principal and interest due on such mortgage shall have been paid into court by the mortgagor he shall be entitled to an order discharging such mortgage, and the registration of a certificate of such order in the proper registry office shall have the same force and effect as the registration of a certificate of discharge of the mortgage as provided by the Registry Act.”

It is quite plainly impossible for the mortgagors to pay this money by reason of the refusal of the mortgagees to receive it, and it is equally impossible for them to receive a certificate of discharge thereof, and it is also plain that they are entitled to pay off the

Riddell, J.

1925.

Re
OLLMANN.

Riddell, J. mortgage and receive a certificate of discharge. The only question
 1925. is as to the application of the words "or for some other cause" in
 RE the eighth line of subsec. 2.

OLLMANN. Of course the general rule for the interpretation of such words
 in a statute or otherwise is that they are to be *ejusdem generis*—
 "where general words follow particular ones, the rule is to con-
 strue them as applicable to persons *ejusdem generis*:" Tenterden,
 C.J., in *Sandiman v. Breach* (1827), 7 B. & C. 96, 100; *Kitchen*
v. Shaw (1837), 6 A. & E. 729.

This rule, which is sometimes called Lord Tenterden's rule, is
 thus stated in Stroud's Judicial Dictionary:—

"Where a statute, or other document, enumerates several classes
 of persons or things, and immediately following and classed with
 such enumeration the clause embraces 'other' persons or things—
 the word 'other' will generally be read as 'other such like,' so
 that the persons or things therein comprised may be read as *ejusdem*
generis with, and not of a quality superior to, or different from,
 those specifically enumerated. The principle of this rule as regards
 statutes was explained by Kenyon, C.J., in *Rex v. Wallis* (1793),
 5 T.R. 375, 379, wherein he said that if the legislature had meant
 the general words to be applied without restriction it 'would have
 used only one compendious word.'"

But this rule is not invariably followed, and it seems to be
 now considered that it has little if any value in statutes conferring
 discretionary powers on the judiciary or such like public function-
 aries.

The object of the statute should be carefully considered in order
 to determine whether a restrictive meaning should be given or one
 which is unrestrictedly comprehensive; and, where the latter seems
 best to carry out the object of the statute, it should be adopted.

The statute was intended to be in relief of mortgagors who
 were in difficulty as to paying their mortgage-money and receiving
 a discharge, and I think it should be given a liberal construction.

No reason is advanced why these mortgagees should not receive
 their money. They are acting capriciously and without legal right,
 injuring the mortgagors in their undoubted legal right, and the
 mortgagors should have all reasonable assistance from the Court.

I am of opinion, therefore, that the words of the statute are
 sufficiently broad to cover this present case, and the order will go
 under the subsections added by the Act of 1915. The mortgagors
 will be entitled to retain out of the amount paid into Court their
 costs of this application, which I fix at \$30.

[ROSE, J.]

MILES v. ONTARIO EQUITABLE LIFE INSURANCE CO.

1925.

June 16.

Insurance (Life and Accident)—Lapse of Policy by Failure to Pay Premium when Due—Reinstatement Conditional upon Good Health of Insured at Time of Payment of Premium—Insured Suffering from Infection which Caused Death shortly afterward—Double Indemnity in Event of Death from Accident — “Event Insured against”—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172(1)—Release—Validity—Estoppel.

A life and accident policy was issued by the defendants in 1921 to M., the plaintiff's husband, the plaintiff being named as beneficiary. The sum assured was \$2,500, which was to be increased to \$5,000 in case (subject to exceptions) of death in consequence of bodily injury effected solely through external, violent, and accidental means. A renewal premium which fell due on the 1st July, 1923, was not paid, and on the 9th August, 1923, the defendants wrote to M. informing him that the policy had become void by reason of the usual provision in it, but might be revived, and that an application for reinstatement would be considered. On the 14th August, in the course of his work as a farmer, he pricked his thumb on a thistle. His daughter, with a needle, or he, with a knife, extracted the prickle—both tried and one succeeded. On the 18th August, he consulted a physician, and on the same day he signed an application to the defendants for reinstatement, certifying therein that to the best of his knowledge and belief he was in good health. The application was sent with the premium to the defendants' treasurer on the 21st August. On the 22nd August, an officer of the defendants decided to reinstate the policy, and notice of reinstatement was sent to M. On the 28th August, M. was taken to a hospital, and died there, of blood poisoning, on the 3rd September. The plaintiff made a settlement with the defendants, accepting \$2,500, the sum assured in case of death from any cause, instead of the \$5,000 payable in respect of death caused by accident, and signing a release. The \$2,500 was paid by an accepted draft upon the defendants for that amount. Afterwards, the defendants offered to return the policy and the release if the plaintiff would give up the draft, which had not yet been presented for payment; but the plaintiff's solicitor wrote to the defendants purporting to accept the \$2,500 “in full settlement of the life insurance,” but not in settlement of the \$2,500 due under the double indemnity clause, and saying that the plaintiff would sue for that unless it was paid. On receipt of this letter, the defendants instructed their bankers to refuse payment of the draft, but it was found that the plaintiff had already presented it and got the money. In this action, to recover the second \$2,500, the plaintiff attacked the settlement as procured by misrepresentation, but did not offer to return the sum paid:—

Held, assuming the policy to have been in force at the time of M.'s death, that the plaintiff had not proved that the cause of the death was such as to bring the double indemnity clause into operation.

Having regard to the provisions of the clause, one of which was that the agreement was not to cover “death resulting directly or indirectly from . . . bacterial infections other than infection occurring simultaneously with and in consequence of an accidental cut or wound,” and having regard also to the statutory definitions

1925.
 ———
 MILES
 v.
 ONTARIO
 EQUITABLE
 LIFE
 INSURANCE
 Co.

of "event insured against" (the Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172(1), the blood poisoning was not a "bodily injury" within the meaning of the statute, and neither the wound caused by the knife nor that caused by the needle could be called bodily injury occasioned by external force or agency *and* happening without the direct intent of M. or as the indirect result of his intentional act.

(2) The defendants' act in giving M. notice of reinstatement was not induced by any misrepresentation on his part; but, although the notice was not expressed to be conditional, the offer on the part of M. to take a renewal upon condition that it should be binding only if the premiums should be paid while he was in good health was accepted by the defendants when they issued the notice; the reinstatement was in fact conditional upon the good health of M. at the time of the payment of the premium; and he was not in good health on the 22nd August.

(3) The release was binding upon the plaintiff, whether the settlement was or was not procured by misrepresentation.

By collecting the amount of the draft and retaining the money, the plaintiff had precluded herself from denying that the release was binding. She had not repudiated the transaction *in toto*, and was estopped from denying the validity of the release.

Hewson v. Macdonald (1882), 32 U.C.C.P. 407, followed.

AN action upon a policy of insurance.

The action was tried by ROSE, J., without a jury, at Woodstock. *W. S. Brewster*, K.C., for the plaintiff.

Gideon Grant, K.C., and *J. C. Haight*, K.C., for the defendants.

June 16. ROSE, J.:—The policy, called a life and accident policy, was issued by the defendants in July, 1921, to J. E. Miles, the plaintiff's husband, the plaintiff being named as beneficiary. The sum assured was \$2,500, which was to be increased to \$5,000 in case (subject to exceptions, one of which will be referred to later) the death of Miles, the assured, should occur in consequence of bodily injury effected solely through external, violent, and accidental means. There was a provision that if any premium should not be paid when due the policy should be void but might be revived by the company within two years from the lapse upon satisfactory evidence of the insured's insurability and upon the payment of the overdue premiums with interest.

A renewal premium which fell due on the 1st July, 1923, was not paid, and on the 9th August, 1923, the company wrote to Miles informing him that the policy had become void and the company's liability had ceased, but that if an application for reinstatement was made it would be considered.

Miles was a farmer. On the 14th August, in the course of his work, he pricked his thumb on a thistle. His daughter, with a needle, or he, with a knife, extracted the prickle—each of them

tried, and one or the other succeeded—and he went on with his work; his thumb, however, gave him some trouble, and on the 18th he consulted a physician in Norwich. The doctor did not think or suggest to Miles that there was anything to cause anxiety, but he cauterized the spot and applied iodine and bandaged the thumb and told Miles to keep his hand elevated.

While Miles was on his way to the doctor's office, he met Hugh Irwin, an agent of the defendant company for soliciting insurance, told him he had allowed the policy to lapse, and asked him whether he (Irwin) could get it reinstated. Irwin read to him one of the company's printed forms of application for reinstatement and asked whether he could make the statements contained in it. He said he could. Then, after a discussion as to how Miles could pay the premium and after Irwin had agreed to advance the money, it was arranged that Irwin should call at Miles's house that afternoon with the papers.

In the afternoon, while the plaintiff and her daughter were present, Irwin came, and Miles signed the application, certifying in it that to the best of his knowledge and belief he was in good health; and he signed also a promissory note in Irwin's favour for the amount of the overdue premium. Irwin says that nothing had been said to him in Norwich about the thumb and that nothing was said about it in the house and that he did not observe the bandage. The plaintiff and her daughter, however, say that Irwin was told about the thistle and was shewn the thumb; and I think it is probable that something was said about the accident (though why the bandage applied by the doctor should have been taken off, as these witnesses say it was, I am at a loss to understand), and that it is more than probable that when Miles was signing the papers Irwin saw the bandage, which was on the right hand—although having attached no importance to it at the time he has forgotten about it now. However, it makes little difference whether Irwin was or was not told anything about the thistle: certainly he did not pass on any information about it to the company; and, even if Miles said nothing about it, there is no reason to suppose that there was any lack of sincerity in Miles's statement to the company, in the written application, that to the best of his knowledge and belief he was in good health. The fact that a prickle of a thistle had got into his thumb and had been extracted, and that the doctor had treated the part and bandaged it, would not be to Miles an indication that there was anything amiss with his health.

Irwin forwarded the application for reinstatement and his cheque (or cash) for the premium to the office in London of his

Rose, J.

1925.

MILES

v.

ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

Rose, J.
1925.
MILES
v.
ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

brother, Edwin Irwin, another agent of the company through whom the policy had been issued. Thence the application was forwarded on the 21st August to the treasurer of the company at Waterloo. On the same day, the physician who had treated Miles was visiting Mrs. Miles, and while at the house examined Miles's hand. He thought there was improvement, although there was still inflammation, but his only advice to Miles was to be careful; he said nothing about any danger. On the next day, the 22nd, one of the company's officials decided to reinstate the policy, and notice of reinstatement was sent to Miles, and Edwin Irwin was notified. On the 23rd August, the inflammation having increased, Miles went to the doctor, who opened the thumb and found pus. On the 25th there was another opening. The doctor had sold his practice and was leaving Norwich, and on this the last occasion on which he saw Miles his successor was present with him. On the 27th the successor was called to Miles's house. Finding Miles in severe pain and with a rapid pulse and a high temperature, he diagnosed blood poisoning, and the next day he had the patient taken to a hospital. Miles died in the hospital, on the 3rd September, of blood poisoning.

Immediately after Miles's funeral, on the 5th September, Rolland Irwin, of Woodstock, another of the company's agents, and a brother of the two Irwins who have been mentioned, prepared claim papers and went with a notary public to Mrs. Miles and had them executed. Mrs. Miles says that she was told that the papers had something to do with probate or administration, and she says that she did not know their contents. Probably she is in error as to this, but nothing turns upon the form of the papers or upon any representation made by Rolland Irwin on this occasion, and no importance attaches to the difference between the two versions of the interview. Among the papers is an affidavit (procured by Irwin) of a friend of Miles's, which contains the statement that the deponent saw Miles on the 18th August, when he (Miles) was "apparently in good health except a sore thumb." There is also an affidavit by the physician who was last in attendance in which the deponent says that he saw Miles first on the 25th August. There is no statement that the trouble had begun before the 25th, and the doctor who had attended first is not mentioned among the "other physicians consulted during the present illness." The claim papers were duly forwarded to the company's head-office and were received by the secretary, who held them until the general manager, who was away, could be consulted. When the general manager had read the papers and had seen the statement that Miles's thumb

was sore on the 18th August, he came to the conclusion that there was doubt as to whether the company was bound. Accordingly he authorised Edwin Irwin to pay Mrs. Miles \$2,500, the sum assured in case of death from any cause, if she would accept it instead of the \$5,000 payable in respect of death caused by accident. (I have not overlooked Rolland Irwin's statement that the manager admitted to him that the company was liable for \$2,500; I accept the manager's evidence.) These instructions were given to Irwin in the evening, when it was too late to issue a cheque, and as Irwin was going to Norwich the next day he was given an accepted draft on the company and was authorised to deliver it in exchange for a release which the general manager prepared and handed to him.

Edwin Irwin and Rolland Irwin met in Norwich and drove to Mrs. Miles's house, Edwin going in and Rolland going for James Miles, a brother of the assured, and bringing him back, so that Mrs. Miles might have some one to advise her. Then, in the presence of James Miles, Rolland Irwin told Mrs. Miles that her claim was doubtful and that in his opinion she would be wise to accept the settlement offered; that she had no claim to the double indemnity, because the death was not the result of an accident; that if she brought an action and the fact that Miles's thumb was sore at the time of the reinstatement came out she might lose everything. Perhaps he stated the matter rather more strongly than this—perhaps he said that if the company had known that the thumb was sore at the time of the reinstatement nothing would have been offered. Mrs. Miles, who was not well at the time and whose memory of the conversations is not altogether to be relied upon, gives a somewhat confused account of the interview. She thinks that Irwin said that he had a paper in which it was set out that Miles had been cut with a knife, and in some way she connects with that statement the statement as to what the company's attitude would have been if the facts had been known. Possibly there was talk about the cutting with a knife, for in the physician's affidavit, included amongst the claim papers, there is a statement that Miles "had been pricking at a thistle in (his) thumb;" but I am inclined to think that Mrs. Miles is in error in her account of what Irwin said, and that in effect he said what I have stated, and possibly that the company would not have made an offer if the facts about the condition of the thumb at the time of the application for reinstatement had been known. I do not think that he refused her time for consideration, as she says he did, or that he told her she must settle then or never. And while, as has been stated, Mrs. Miles was not well, I do not believe she was unable to understand what she was doing.

Rose, J.
 1925.
 MILES
 v.
 ONTARIO
 EQUITABLE
 LIFE
 INSURANCE
 Co.

Rose, J.

1925.

MILES

v.

ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

After Irwin had said what he had to say, Mrs. Miles and her brother-in-law discussed the matter apart, and then she signed a release and was given the draft.

On the 22nd September, 1923, the solicitor who was preparing the papers to lead to administration of Miles's estate (or to probate of his will) wrote to the company asking why \$2,500 had been paid and not \$5,000, and on the 28th the company's general manager answered that "payment was not made under the double indemnity clause for the reason that it did not cover this particular case;" and also that if the company had known, as it had since discovered, that Miles was not in good health at the time of the reinstatement, nothing would have been paid; and he added, "If the beneficiary is not satisfied, kindly return to us the draft given by Mr. Irwin and we will return the release and the policy to you." If this letter had been written more carefully it would not have contained the statement that the company did not know of the ill-health at the time of the reinstatement; the company, when it made the settlement, had information that the thumb was sore at the time of the reinstatement, and what the writer of the letter says in the witness-box that he had in mind was that if at the time of the settlement he had known as much as he knew at the time of writing the letter he would not have authorised any payment. However, the accuracy or inaccuracy of the statement of fact contained in the letter is of no direct importance—its only importance is in its bearing upon the credibility of the witness and upon the question as to the materiality of such information as could have been given by Miles at the time of his application for reinstatement. The offer to return the policy and the release if Mrs. Miles gave up the draft, which she had not yet presented for payment, is, however, quite important in view of what happened later.

The plaintiff's next step was taken through another solicitor who on the 10th November wrote to the company purporting to accept the \$2,500 "in full settlement of the life insurance," but not in settlement of the \$2,500 due under the double indemnity clause, and saying that Mrs. Miles would sue for the last mentioned amount unless it was paid. As soon as the defendants received this letter they sent instructions to their bankers to refuse payment of the draft, but it was found that the plaintiff had proceeded promptly and had got the money. No offer of a return of the sum paid has been made, although in this action the plaintiff attacks the settlement as procured by misrepresentation. For reasons which will be stated, my opinion is that in these circumstances

the release is binding upon the plaintiff now even if it was not binding originally, and that the action must be dismissed upon that ground; but the parties are entitled to an expression of my opinion on the other matters discussed at the trial, and it will be convenient to deal with those points before discussing the effect of the collection of the amount of the draft.

It seems to me to be the better opinion that, assuming the policy to have been in force at the time of Miles's death, the plaintiff has not proved that the cause of the death was such as to bring the double indemnity clause into operation. The clause provides that "upon due proof that the death of the insured occurred . . . in consequence of bodily injury effected solely through external, violent, and accidental means, of which . . . there is a visible . . . wound on the exterior of the body, and that such death occurred . . . as the direct result (of the injuries) independent of all other causes," the company shall pay \$5,000; but the agreement is declared not to cover "death resulting directly or indirectly from . . . bacterial infections other than infection occurring simultaneously with and in consequence of an accidental cut or wound." The thistle prick was "bodily injury effected solely through external, violent, and accidental means," and, no doubt, the wound caused by the thistle was visible, for a time; so that, if the death resulted from a bacterial infection occurring simultaneously with and in consequence of the thistle prick, the clause comes into operation. But nothing accidental was done by the assured with his knife or by his daughter with her needle, and if the bacteria entered, not with the thistle, but by the wound caused by one of these instruments, the clause does not apply; and, as no one can say when the infection took place—as it is at least as likely to have taken place at the time of or as a result of the operation performed by the assured or his daughter as at the earlier time—it seems to me that the proof requisite to bring the clause into effect is lacking. I do not overlook the fact that if the plaintiff had given evidence justifying a finding that the death was the result of causes mentioned in the main part of the double indemnity clause, and the defendants had relied upon the exception of "death resulting from . . . bacterial infections other than infection occurring simultaneously with . . . an accidental cut or wound," the onus of proving that the infection did not occur with the accidental wound (the thistle prick) would have been on the defendants. But that is not the case in hand. In the present case there is evidence of three wounds, one accidental and the others intentional, and evidence that bacteria entered by

Rose, J.

1925.

MILES
v.ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

Rose, J.

1925.

MILES

v.

ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

one of the three, but nothing whatever to suggest that that one was the accidental wound.

In addition to the clause in the policy itself, the statutory definition of the "event insured against" by a clause such as this (R.S.O. 1914, ch. 183, sec. 172 (1))* must, of course, be looked at, but it seems to me to carry the case no further. The blood poisoning does not seem to me to be a "bodily injury" within the meaning of the statute; and neither the wound caused by the knife nor that caused by the needle can be called bodily injury occasioned by external force or agency *and* (a) happening without the direct intent of Miles, or (b) as the indirect result of his intentional act. Therefore, in my opinion, the statute does not apply.

Another question was, whether the defendants were bound by their notice of reinstatement. I have mentioned already that I do not think that the defendants' act was induced by any misrepresentation on the part of Miles. The information that Miles had was information that was material to the company to enable it to judge of the risk—this is clearly established by the evidence—but the company did not ask for anything beyond Miles's statement that to the best of his knowledge and belief he was in good health, and there is nothing to suggest a doubt that, as he understood the expression "good health," Miles's statement was true, or that he withheld from the company any information which he knew the company ought to have. Therefore, it is my opinion that the defence based upon misrepresentation fails.

Another reason advanced by the defendants for saying that they are not bound by the notice of reinstatement is that the reinstatement was conditional and that the stipulated condition did not exist. The application signed by Miles on the 18th August contains an agreement on his part that the reinstatement, if granted, shall not take effect until all premiums in arrears have been duly paid during his continued good health. The overdue premium was paid to the company by Irwin on the 22nd August, and on the same day the company granted the reinstatement by sending to Miles the notice before referred to. This notice acknowledges receipt of the premium and of satisfactory evidence of insurability, and

* 172 —(1) In every contract of insurance against accident or casualty or disability, total or partial, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured or as the indirect result of his intentional act, such act not amounting to voluntary or negligent exposure to unnecessary danger, and no term, condition, stipulation, warranty or proviso of the contract varying the obligation or liability of the assurer shall as against the assured have any force or validity.

states that the policy has been reinstated and is again in full force; but I think that, while the notice—differing in this respect from the renewal receipt considered in *Battle v. Fidelity and Casualty Co. of New York* (1923-24), 54 O.L.R. 24, 55 O.L.R. 330, and from the policy in *Moore v. Metropolitan Life Insurance Co.* (1923), 54 O.L.R. 474—is not expressed to be conditional, the offer on the part of Miles to take a renewal upon condition that it should be binding only if the premiums should be paid while he was in good health was accepted by the company when it issued the notice of reinstatement, and that the reinstatement was in fact conditional upon the good health of Miles at the time of the payment of the premium.

Of the fact that Miles was not in good health on the 22nd August I think there can be no doubt. The poison had entered his blood six days before and had produced inflammation and pain; the process which led to his death ten days later had begun; and, in those circumstances, it cannot be said that he was in good health. I think that on this ground also the action must fail.

I return now to the release. The Irwins were acting partly in the interest of the company and partly on behalf of Mrs. Miles. The policy had been issued through the office of one of them, and Edwin and Rolland were anxious, largely for the sake of their reputation as agents, it seems, that there should be a prompt settlement, satisfactory to Mrs. Miles. Rolland says (truly, I think) that he had been trying to induce the manager of the company to pay in full; and, when he found that the company would not pay more than the \$2,500, he believed, I think, that Mrs. Miles would be wise to take that amount. This being his opinion, and his desire being to have the matter settled quickly, there is no doubt that he urged Mrs. Miles pretty strongly to close upon the terms offered, but I do not think that he or Edwin Irwin hurried her into the settlement, in the sense of refusing to accede to a request of hers for delay; and I do not think that he made any material statement that was untrue, unless he said that if the company had known that Miles's thumb was sore at the time of the reinstatement no offer of settlement would have been made. I am in doubt as to whether he made this last mentioned statement; I do not think I could find affirmatively that he did; and, if the case turned on the question as to whether the release was procured by misrepresentation, my present feeling is that the judgment would have to be in favour of the company. However, my opinion is, as stated already, that the issue upon the release must be decided in favour

Rose, J.
1925.
MILES
v.
ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

Rose, J. of the company whether the settlement was or was not procured
1925. by some misrepresentation.

MILES
v.
ONTARIO
EQUITABLE
LIFE
INSURANCE
Co.

The theory of the plaintiff's advisers seems to have been that she was in the position of a creditor whose debtor, upon making payment of part of the debt, had attempted to attach a condition that the part should be accepted in full—that she could collect the amount of the draft and proceed for the balance of her claim. But, in my opinion, that was not the plaintiff's position at all. It is not the case of an attempt on the part of the company to impose a condition upon the use of the draft. The draft was handed to the plaintiff because, and only because, she had agreed to accept the amount in full of a doubtful claim; and she had no right to it except the right given to her by the agreement represented by her release. She did not use it until she had had legal advice and until the defendants had offered to let her out of her bargain, not merely if she thought it had been induced by misrepresentation, but if she was dissatisfied with it for any reason. Then, with her eyes open, she elected to use the draft. I suppose that it ought not to be said that the presentation of the draft to the bank is proof of an election on the part of the plaintiff to affirm the settlement; for her solicitor's contemporaneous letter makes it plain that she elected, not to affirm the contract, but, if possible, to take the benefit of it while repudiating its obligations. But I think it can and ought to be said that by accepting the benefit of the contract she put it out of her power successfully to repudiate its obligations. This, I think, is decided in *Hewson v. Macdonald* (1882), 32 U.C.C.P. 407—see p. 415. There is no conflict between the decisions in *Hewson v. Macdonald* and *Doyle v. Diamond Flint Glass Co.* (1905), 10 O.L.R. 567. The distinction between the two cases is in the facts—see 10 O.L.R. at p. 573—and the order in the *Doyle* case indicates what the plaintiff in the present case ought to have done if she was advised that notwithstanding the cashing of the draft she was entitled to attack the release: she ought to have paid the money into court or to the defendants. Instead of doing so, she raised the issue as to the validity of the release only by a reply filed at the trial, and she did not, even at the trial, offer to return the money. The defendants contended throughout that, by collecting the amount of the draft and retaining the money, the plaintiff had precluded herself from denying that the release was binding. In my opinion, their position is sound: the plaintiff, like the plaintiff in *Hewson v. Macdonald*, had not repudiated the transaction *in toto*, and she is estopped from denying the validity of the release.

The action will be dismissed with costs.

[APPELLATE DIVISION.]

RE ORR V. KREPSKY.

1925.

June 17.

Division Courts—Jurisdiction—Person Substituted as Defendant for Defendant upon whom Summons Served—Amendment of Summons—Failure to Serve Amended Summons—Substituted Defendant not Appearing on Day Fixed for Trial—Judgment Entered against her as on Default—Motion to Division Court Judge to Set aside Refused—Motion then Made for Prohibition—Certificate of Division Court Judge not Settled in Presence of Parties—Evidence—Waiver—Irregularity—Division Courts Act, secs. 34, 85, 87, 97 (1), (4)—Division Court Rules, 3, 37.

In a Division Court, no valid judgment can be given against a defendant (except under sec. 97(4) of the Division Courts Act) unless a summons is issued and served, or that procedure is waived by the defendant's appearance.

Sections 34, 85, 87, and 97(1) and (4) of the Act, and Division Court Rules 3 and 37, referred to.

The person named as defendant in a summons issued from a Division Court was served with the summons and on the day after the service filed a notice disputing the plaintiff's claim. Four days later this person, accompanied by her mother, appeared before the Judge of the Division Court, at his chambers; and, upon the application of the plaintiff, who was represented by a solicitor, the summons was amended by substituting the mother for the daughter as defendant. It was said, on behalf of the plaintiff, that the substituted defendant consented to the substitution, waived personal service of the summons, and consented to the fixing of a certain day for the trial of the action. The substituted defendant did not appear on that day, and judgment by default was entered against her. Subsequently a motion was made by her to set aside the judgment, and was refused. Upon motion then made to a Judge of the Supreme Court in Chambers, an order was made for prohibition to the Division Court, from which the plaintiff appealed. After the appeal was launched, the Judge of the Division Court prepared and sent to the Court a statement in which he certified that on the 27th December, 1924, the parties being before him at his chambers, he was satisfied that it was the mother who was intended to be sued and that the wrong name was used by mistake. Both mother and daughter being present, with the consent of all parties, he substituted the name of the one for the other and endorsed the substitution on the original summons:—

Held, by the majority of the Court, that this certificate could not be treated as evidence upon the appeal, no leave to adduce evidence not before the Judge in Chambers having been given or asked, and the document not having been settled after notice to or in the presence of the defendant; and *quære*, whether a Judge can give as evidence, in a proceeding to which he is personally a party, his own certificate.

Per RIDDELL, J.:—The document should be received as a certificate, the objection to it being waived by the substituted defendant, the respondent upon the appeal, who insisted on it being considered.

Held, also, by the majority, that the respondent, who was a foreigner, did not knowingly consent to being added as a party and did not waive personal service of the summons; and that the Judge, while he had power, under subsec. 1 of sec. 97, to add the respondent as a defendant, had no power to apply subsec. 4 and to add her sum-

1925.

RE ORR

v.

KREPSKY.

marily and dispense with the service of a copy of the summons, even on consent, for the application was not made at the trial of the action.

Per LATCHFORD, C.J.:—Remarks upon the scrupulous care which should attend the administration of justice in a case where the interests of a foreigner unacquainted with the English language are affected; and reference to *Rex v. Lee Kun*, [1916] 1 K.B. 337.

Held, also, that the respondent, by applying to the Judge of the Division Court, under the Division Courts Act, to set aside the judgment, had not waived her right to move for prohibition.

McGregor v. Norton (1889), 13 P.R. 223, approved.

Held, therefore, that the Division Court never acquired jurisdiction over the defendant; and the order for prohibition was affirmed (RIDDELL, J., dissenting).

Per RIDDELL, J.:—Where the jurisdiction over the subject-matter of the action is not questioned, but irregularity in respect of the parties or otherwise is alleged, prohibition is not *ex debito justitiæ*.

The certificate of the Division Court Judge, insisted upon by the respondent, being accepted, it could not be contradicted by affidavit.

On the respondent's own shewing, after notice of the alleged irregular insertion of her name as defendant in the action and non-service upon her of the amended summons, a proceeding was taken by her in the action so constituted, and she thereby waived her right to move for prohibition.

If the Division Court Judge erred in refusing the motion to set aside the judgment, that was a mistake in a matter within his jurisdiction.

The substitution of the respondent as defendant without service of the amended summons was, if irregular, no more than an irregularity, and was not a ground for prohibition.

Review of the authorities.

APPEAL by the plaintiff in a Division Court plaint from an order made by MIDDLETON, J.A., sitting in Chambers in the High Court Division, granting a motion by the defendant for prohibition to a Division Court and the Judge thereof.

June 2. The appeal was heard by LATCHFORD, C.J., RIDDELL, J., MASTEN, J.A., and WRIGHT, J.

A. C. *Heighington*, for the appellant, contended that the Division Court had jurisdiction, and referred to *Re Bryant v. City Dairy Co.* (1921), 50 O.L.R. 40; *London Corporation v. Cox* (1867), L.R. 2 H.L. 239; the Division Courts Act, R.S.O. 1914, ch. 63, sec. 104; *Re Soules v. Little* (1888), 12 P.R. 533.

J. P. *Walsh*, for the defendant, respondent, argued that she was never properly brought into court, and no judgment could lawfully be pronounced against her. He referred to several of the provisions of the Division Courts Act, cited below.

June 17. MASTEN, J.A.:—Appeal from the order of Middleton, J.A., granting prohibition to the 7th Division Court of the County of Essex.

In my opinion, the disposition of the question raised on this appeal depends on whether the respondent ever became subject to the jurisdiction of the Division Court. It is elementary and fundamental that every defendant must be duly summoned and fully heard. As was said by Fortescue, J., in *Rex v. Chancellor of University of Cambridge* (1723), 1 Str. 557, 567: "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam' (says God) 'where art thou? Hast thou eaten of the tree whereof I commanded that thou shouldest not eat?' And the same question was put to Eve also."

App. Div.
1925.
RE ORR
v.
KREPSKY.
Masten, J.A

Has, then, this defendant been duly summoned and put upon her defence in accordance with the requirements of the Division Courts Act and Rules? The provisions of that Act and the Rules relating to this matter are as follows:—

Section 34: "The clerk shall issue all summonses and shall make copies thereof with the notices thereon, according to the prescribed form, and, except as otherwise provided by this Act, shall deliver the same to the bailiff for service."

Section 85: "The summons, with a copy of the account or particulars attached, shall be served ten days at least before the return day thereof, and, where a defendant resides out of the county in which the action is brought, fifteen days at least before the return day thereof."

Section 87: "Where the amount of the claim exceeds \$15 the service shall be personal, and where the amount does not exceed \$15 the service may be on the defendant, his wife or servant, or on a grown up inmate of the defendant's dwelling house or usual place of abode or business."

Section 97: "(1) The Judge may at any stage of the proceedings, upon such terms as may appear to him to be just, order that the name of the plaintiff, defendant, or garnishee improperly joined be struck out, and that any person who ought to have been joined or whose presence is necessary in order to enable the Judge effectually and completely to adjudicate upon the questions involved in the action be added as plaintiff, defendant, or garnishee."

"(4) A person who is added as a defendant or garnishee, shall be served with a copy of the summons, the original summons being first amended, and the proceedings against him shall be deemed to have been commenced from the date of the making him a party: but if the application to add any person as a party defendant or

App. Div. garnishee be made at the trial, the Judge may make the order in
1925. a summary manner upon such terms as to him may seem just,
and may dispense with the service of a copy of the summons if
RE ORR such person or his agent consents thereto."

v.
KREPSKY.

Masten, J.A. Rule 3: "All actions shall be commenced by summons under the seal of the court, and signed by the clerk (Form No. 32) and shall be endorsed with or have attached thereto the plaintiff's claim as provided by the Act."

Rule 37: "All proceedings, books and documents, shall be in the prescribed forms to the rules appended."

The form of summons is prescribed by Form 32.

These provisions indicate that, though in certain other respects some latitude is allowed in Division Court practice, yet the Legislature has deliberately made the provisions which I have just quoted specific and precise with the intention that (save under sec. 97, subsec. 4) no valid decision or judgment can be given against a defendant unless a summons is issued and served, or that procedure is waived by the defendant's appearance. It is true that provision is made by sec. 88 for substitutional service, but no one suggests that sec. 88 has any application to the circumstances of this case.

Certain of the facts are not in dispute. The plaintiff issued a summons in the 7th Division Court of Essex. In that summons he named one Helen Krepsky as sole defendant. This summons was, on the 22nd December, 1924, served in due course on Helen Krepsky. On the 23rd December, Helen Krepsky filed a notice of defence with the Division Court clerk. On the 27th December, Helen Krepsky and Catherine Krepsky, accompanied by one Winters, appeared before his Honour Judge Smith, at his chambers at Windsor. According to the affidavit of the plaintiff (Orr), the Judge on this occasion, at the instance of the plaintiff, amended the original summons which had been served on Helen, and substituted for Helen her mother, Catherine. How this meeting or attendance came about does not appear, but it cannot be regarded as a trial of the action, which could only take place not less than eleven days after the 22nd December, the day of service on Helen Krepsky. No formal order appears to have been issued recording what was done on this occasion. Further, it is an undisputed fact that the summons as amended was not reissued by the clerk of the Court, and has not been served on Catherine. The plaintiff, however, asserts that at this meeting on the 27th December the respondent, either personally or through Winters, consented to the substitution of her name as defendant; waived personal service of the summons; and consented to the fixing of the trial for the 5th

January, 1925. This is denied by the respondent, Catherine Krepsky, and by Winters.

At this point I should refer to a written statement which has been forwarded by his Honour Judge Smith to the Registrar of this Court since this appeal was launched. In my opinion, we are not at liberty to treat this document as evidence upon this appeal: first, because no leave has been given or asked to file evidence which was not before the Court below; second, it seems to me exceedingly doubtful whether a Judge can give as evidence, in a proceeding to which he is personally a party, his own certificate. It is unnecessary to determine this point, for the document in question was not settled after notice to or in the presence of the respondent, and I think that any reference made to it by counsel for the respondent could properly be made in its quality of a written argument addressed to this Court by his Honour as a party.

For these reasons, while according to this communication my respectful consideration as an argument, I would decline to accord it any evidentiary quality.

After careful and frequent perusal of the affidavits, I have no doubt that the learned Division Court Judge thought he was acting on the consent of the respondent in all he did, but I am also clearly of opinion that neither the respondent nor Winters (if he had any authority to represent the respondent) thought that they were so consenting and that the respondent did not waive personal service of the summons. The learned Judge had undoubted power to add the respondent as a party defendant, pursuant to the provisions of subsec. 1 of sec. 97, quoted above; but he had no power, in my opinion, to apply subsec. 4 of sec. 97, and to add the respondent summarily and dispense with the service of a copy of the summons, even on consent, for the application was not made at the trial of the action. It is suggested on behalf of the appellant, in argument, that the respondent by applying under the Division Courts Act to set aside the judgment and execution issued against her had taken her chance and waived her right to prohibition; but that argument is met by the decision of the Common Pleas Division in *Re McGregor v. Norton* (1889), 13 P.R. 223. That was a motion for prohibition. Before launching the motion the defendant applied to the Division Court Judge to set aside the judgment. The point is dealt with by Rose, J., at p. 226 of the report, where he says:—

“I do not think the application to set aside the judgment any reason to refuse to entertain this application. That question was considered in *Sherwood v. Cline* (1888), 17 O.R. 30, at p. 39, and I cannot usefully add to what was there said, except to say that

App. Div.

1925.

RE ORR

v.

KREPSKY.

Masten, J.A.

App. Div. I think it was a convenient practice to move in the Court below,
 1925. and give the plaintiff an opportunity to abandon his position before further proceedings were taken."

RE ORR

v.

KREPSKY.

Masten, J.A.

In the view so expressed I respectfully concur.

I ought not to part with the case without observing that I have no doubt that the learned Division Court Judge acted in perfect good faith, believing that he had the consent of the respondent to the action taken, and that he was acting within his jurisdiction. I have no doubt also that his subsequent refusal to set aside the judgment arose from the conviction that the respondent was relying upon a bare technicality which he considered unfounded. No doubt, she is relying upon a bare technicality, for ample notice was afforded her of the plaintiff's claim, and of the proposed place and time of trial. But, for the reasons above indicated, I think the respondent has never waived her right to be personally served with the summons, and that the Legislature intended, and, if I may say so, wisely intended, that the utmost precision should be observed in the service of initial process as a condition precedent to the assertion of jurisdiction over a defendant. No such service having been effected, the 7th Division Court never acquired jurisdiction over the respondent, and the judgment and the execution upon it are nullities.

The appellant's claim and the respondent's counterclaim can be determined only after due service on the respondent of a summons. As the respondent is a foreigner, I should perhaps add that if and when such a trial takes place she may rest assured that her contentions will receive the fairest consideration of the Court, unbiassed by anything that may have transpired on this motion or earlier. I would dismiss the appeal with costs to be paid by the plaintiff (Orr).

LATCHFORD, C.J.:—I have had the advantage of reading the judgment of my brother Masten, and concur in the result at which he arrived. However, I am not as certain as he appears to be that the respondent relies merely on a technicality, though that of itself may entitle her to succeed. Mrs. Krepsky is a foreigner with but little knowledge of the English language. The scrupulous care which should attend the administration of justice at all times, and especially when the language of the Court is probably not understood, was not, I think, observed when her name was not added to but substituted for that of the original defendant in the informal proceedings of the 27th December.

Upon the evidence adduced, I cannot but doubt that she was made aware of what was then ordered, and she was never served with a summons. Without full knowledge she cannot be held to have waived the service directed by the Division Courts Act. I would accordingly dismiss the appeal.

I may add that in my opinion the observations of Lord Reading, C.J., in *Rex v. Lee Kun*, [1916] 1 K.B. 337, while specially applicable to a criminal case, are not without pertinence in every case in which the interests of a foreigner unacquainted with the English language are, as here, materially affected.

WRIGHT, J., agreed with MASTEN, J.A.

RIDDELL, J.:—An appeal from the order of Mr. Justice Middleton granting prohibition to the Seventh Division Court of the County of Essex.

Since the appeal was launched, the learned County Court Judge has sent a certificate of the proceedings.

This we should have refused to consider under the well established practice—it not having been settled in the presence of both parties; but, notwithstanding our intimation to that effect upon the hearing of the appeal, counsel for the appellant offered it and counsel for the respondent insisted upon our considering it. It is quite clear that the certificate is in the terms in which it would have been had we called for it and the learned County Court Judge had settled it in the presence of all parties. The practice of requiring a certificate to be settled in the presence of both parties is for the protection of the party against whom it is intended to be used, and that party may waive the objection. In the present case the defendant not only waives the objection, he even insists on our considering the certificate. In view of the position taken by the counsel for the respondent, I do not think we can refuse so to consider it.

As there are differences in the statements of fact contained in the certificate and in the affidavits filed below by the defendant, it seems necessary to say that it is the settled practice of the Court to give full credence to a judicial certificate. I shall, nevertheless, mention the contentions of the respondent where there is a dispute as to the accuracy of the certificate.

It appears that the plaintiff, the present appellant, brought an action in the Division Court, giving the name of the defendant as "Helen Krepsky." The mother of Helen Krepsky, namely, Katherine Krepsky, the respondent herein, attended the hearing of a

App. Div.

1925.

RE ORR

v.

KREPSKY.

Latchford,

C.J.

App. Div.
1925.

RE ORR
v.
KREPSKY.

Riddell, J.

motion for speedy judgment, on the 27th December, 1924, in the city-hall at Windsor. Mother and daughter were espied and recognised as "foreign women" by Mr. Winters, Inspector of the Children's Aid Society, who accompanied the women to the Judge's chambers in the city-hall and represented them, *sub modo*, in the matter.

The Judge was satisfied that it was by the merest slip that the name "Helen Krepsky" had been inserted as the name of the defendant in the summons. Apparently it was the mother who was intended to be sued, and the wrong name was used by a mere mistake. He says: "Both were present, and with the consent of all parties I substituted the name of 'Catherine' for 'Helen.' . . . and I endorsed the substitution on the original summons and Mrs. Catherine Krepsky was called as a witness."

Winters says: "The only reason I took part in the proceedings as aforesaid was that Helen Krepsky and her mother were foreigners and did not seem to understand very well what was required of them, and to assist them and assist the Court I undertook to explain the matter to them in the first place, and attend with them before the Judge. . . . C. M. Orr (the plaintiff) was represented by one F. D. Davis, Esquire, K.C., as his counsel. There was some discussion between the Judge and Mr. Davis, and proceedings were then adjourned, as I understood it, so that the plaintiff might amend his claim by adding Catherine Krepsky as a defendant. Seeing that there was not going to be a trial this day, I told the defendant Helen Krepsky and her mother Catherine Krepsky that they might go home. It has now been drawn to my attention that it is alleged that, while Helen Krepsky and her mother were in the Judge's chambers, a formal motion was then and there made by Mr. Davis and the summons amended by changing the name of Helen Krepsky to Catherine Krepsky, and that the amendment was then and there endorsed on the original summons, and that it was then and there understood that the matter should stand for trial until the 5th January, 1925, and that all this was consented to by all parties. I was in the Judge's chambers until Catherine Krepsky and Helen Krepsky left, and there was nothing said which could possibly be construed by me as indicating that the summons was then and there being amended, or that an application was then and there being made to amend it, and I positively state that there was not a consent on the part of Catherine Krepsky or Helen Krepsky personally, or by me as their representative for the time being, that such an amendment as is now alleged might be made, and the action come on for trial on the 5th January, 1925."

The present defendant says: "I had no knowledge of the nature of the proceedings, nor any knowledge that I had been substituted as a defendant in the action, and the first intimation that I received that I had been so substituted was upon being advised that judgment had been given against me by default of appearance."

App. Div.

1925.

RE ORR

v.

KREPSKY.

Riddell, J.

The plaintiff swears: "That a motion for speedy judgment in this action came up before his Honour George Smith, Judge of this Court, at his chambers in the city-hall, Windsor, on the 27th December, 1924, at 10 a.m., and the defendant Catherine Krepsky and her daughter Helen Krepsky were both present and were represented by one M. Winters. Through a mistake in giving instructions to my solicitors, the name Helen Krepsky was put in the claim as a defendant instead of her mother, Catherine Krepsky; and the said Judge, after hearing the statements of the parties, on the application of the plaintiff, amended the summons by changing the name 'Helen' to the name 'Catherine,' and the amendment was endorsed upon the original summons at that time by the said Judge. The Judge then fixed the 5th January, 1925, as the time for the trial of the action, which was consented to by the parties."

Whatever the facts so far, there is no doubt as to some of the facts following. The defendant consulted a firm of solicitors, one of whom swears:—

"1. That I am a member of the firm of Roach, Riddell, & Ferrari, solicitors for the defendant herein, and as such have knowledge of the matters herein deposed to.

"2. Some time prior to the 16th January, 1925, an action was instituted by the plaintiff herein against one Helen Krepsky; but, prior to the action going on for trial, the defendant Helen Krepsky was struck out and one Catherine Krepsky was substituted as defendant. The said defendant Catherine Krepsky was not served with a copy of the summons, and consequently did not appear, and judgment was given against her."

The defendant having retained solicitors after her name was substituted for that of her daughter, they, knowing of the substitution, took the stand that she must be personally served with the amended summons; a copy was mailed to her and a copy to her solicitors, but they refused to proceed to trial unless and until she was served with the amended summons. A more technical defence it is hard to conceive of. No possible good end could be achieved by the formal service upon the defendant—the only result would be an increase of costs.

On the other hand, I do not understand why the plaintiff's

App. Div. solicitors did not pursue the formal practice and serve the summons instead of mailing it to the defendant and her solicitor.
1925.

RE ORR
v.
KREPSKY.

Riddell, J.

After this trivial skirmishing, both parties apparently looking for trouble, a letter was sent to the defendant advising her of the hearing on the 5th January. On her non-appearance, the case was adjourned until the 15th January, and she was notified (by letter) of the date, but she again remained away, and judgment went against her. Now was the time to apply for prohibition on the ground of irregularity; but that course was not pursued; a step in the action as then constituted was taken by the defendant with full knowledge of the facts. Her solicitor, on the 13th February, 1925, made an application to set aside the judgment under the new style of cause. He swears that "the learned trial Judge refused to hear the motion and the evidence in support of the same." The Judge certifies: "After arguments by solicitors for both parties in open Court, all parties being present, I refused the application"—probably the difference is only in terminology; it is incredible that the Judge actually refused to hear counsel at all. Were the cause of action not within the jurisdiction of the Division Court, this proceeding could not prejudice the defendant—it could not give jurisdiction where none existed: *Farquharson v. Morgan*, [1894] 1 Q.B. 552; *DeHaber v. Queen of Portugal* (1851), 17 Q.B. 196, at p. 214. But where, as Mr. Justice Osler puts it, "the Court has jurisdiction over the cause of action as to its locality, nature, and amount," and the only difficulty is "the absence of power to compel the appearance of the defendant" (*Re Guy v. Grand Trunk Railway Co.* (1884), 10 P.R. 372, at p. 375), the rule is different. In such a case prohibition is not a matter of right. In other words, where it is not a question of jurisdiction over the subject-matter, but of irregularity in respect of the parties or otherwise, prohibition is not *ex debito justitiæ*.

Any proceeding taken in the case after discovery of the irregularity is, as a rule, considered to impel the Court to refuse prohibition.

Our Courts, as well as the English Courts, have consistently followed the rule laid down by Erle, J., in *In re Jones v. James* (1850), 19 L.J. N.S. Q.B. 257, 258:—

"Where an inferior Court has no jurisdiction from the beginning, a party, by taking a step in a cause before it, does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards."

In his judgment, at p. 259, the learned Judge points out that "the Judge of the County Court would have jurisdiction in the suit if the defendant proceeded in it without making the objection," and consequently the rule above stated did not apply.

In *Mouflet v. Washburn* (1886), 54 L.T.R. 16, *Jones v. James* was followed and the decision of Erle, J., approved. *Moore v. Gamgee* (1890), 25 Q.B.D. 244, also applied the same rule, as did *Maisonneuve v. Township of Roxborough* (1899), 30 O.R. 127.

And it must be borne in mind that prohibition is an extreme measure and should not be granted except in a very plain case of the unlawful exercise of jurisdiction: *Re Cummings and County of Carleton* (1894), 25 O.R. 607; *In re Grass v. Allan* (1866), 26 U.C.R. 123. It is to be granted only when the inferior Court has exceeded its jurisdiction, not where it has within its jurisdiction committed an error in law or good conscience: *Siddall v. Gibson* (1859), 17 U.C.R. 98; *In re Dyer v. Evans* (1899), 30 O.R. 637. In *Re Bryant v. City Dairy Co.*, 50 O.L.R. 40, it is said (p. 46) :—

"The law as to prohibition to an inferior Court is well stated by Osler, J.A., in *In re Long Point Co. v. Anderson* (1891), 18 A. R. 401, at p. 408:—

"In a matter within his jurisdiction he may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high immunity from correction, except upon appeal, as any other Judge: *Siddall v. Gibson*, 17 U.C.R. 98."

"Meredith, J., also said (p. 411) :—

"It has long been too firmly settled in this Province to be now disturbed even by this Court, that, however wrong in fact or law the determination of the inferior Court may be, prohibition will not lie if the matter be within its jurisdiction."

It is tersely put by the late Chief Justice of Ontario, Sir William Meredith (50 O.L.R. at p. 47) : "The Judge of the Division Court having jurisdiction, prohibition does not lie."

The same rule is followed in *Re Town of Ameliasburg v. Pitcher* (1906), 13 O.L.R. 417; *Re Errington v. Court Douglas Canadian Order of Foresters* (1907), 14 O.L.R. 75. In matters within his jurisdiction we have no more right to dictate to the County Court Judge than he has to dictate to us. .

If there be merely an error or irregularity in the procedure, the remedy is by way of appeal, and if there is no appeal there is no remedy: *Regina v. Lord Mayor of London* (1893), 69 L.T.R. 721; *Re McLean v. McLeod* (1871), 5 P.R. 467.

There are three grounds upon which I would allow this appeal, any one of which is, in my opinion, sufficient:—

App. Div.

1925.

RE ORR

v.

KREPSKY.

Riddell, J.

App. Div.

1925.

RE ORR

v.

KREPSKY.

Riddell, J.

1. The certificate of the learned Judge insisted upon by the respondent cannot be contradicted by affidavit.

2. On the respondent's own shewing, after notice of the alleged irregular proceeding of inserting the respondent's name as defendant in the action and non-service upon her of the amended summons, a proceeding was taken in that action so constituted.

If, as stated in the affidavit of the solicitor, therein contradicting the certificate, the learned Judge made an error or was unjust, even if he refused to hear the motion (which I cannot believe), that was a mistake by the Judge in a matter within his jurisdiction.

3. Even if the insertion of the name of the defendant, followed by non-service of the amended summons, was irregular, it was an irregularity only, and consequently it is not a matter for prohibition.

I am not to be taken as holding that the action of the Judge was irregular. I think it was not, but that I conceive to be immaterial, and I do not proceed on that ground.

I would allow the appeal. But, except for the costs of this appeal, which the plaintiff should have, there should be no costs—the plaintiff rather invited some such proceeding.

If there is in fact any foundation for the statement that the learned Judge “refused to hear” the motion, there is an appropriate remedy; but it is not prohibition.

The plaintiff swears: “I have at all times been ready and willing to have the matter tried out upon the merits, but the defendant has persistently refused to do this until she has received a copy of the summons in the action.”

That being so, it seems to me that the sensible and just course to pursue would be for all parties to consent to the present motion being considered an appeal from the judgment, and we should then allow the appeal and direct a new trial, with all costs of this proceeding throughout to be costs in the cause.

By such a course the plaintiff, if he has an honest claim, will secure it; and the defendant, if she has a valid defence, can set it up.

Appeal dismissed (RIDDELL, J., dissenting).

[APPELLATE DIVISION.]

DISNEY v. HOWICH.

1925.

June 23.

Vendor and Purchaser — Exchange of Lands — Misrepresentations — Failure to Prove—Assumption of Mortgages—Understanding of Parties — Consideration — Implied Contract — Equitable Obligation — Married Woman — Liability — Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 42—Indemnity—Form of Judgment.

The judgment of MEREDITH, C.J.C.P., 56 O.L.R. 606, was reversed. *Held*, upon the evidence, that there was no ground for the finding that D. misrepresented his property or the leases of it and thus induced the contract of exchange.

Held, also, that both H. and her husband understood that the mortgages upon D.'s property were to be assumed and paid by her—the assumption of the mortgages was part of the consideration.

Although the deed from D. did not refer to the mortgages and contained no covenant on the part of H. to assume and pay them, yet, having regard to the facts manifest in the transaction, there was an implied obligation on her part to do so.

Waring v. Ward (1802), 7 Ves. 332, 337, and subsequent cases, applied and followed.

The obligation was enforceable against H., although she was a married woman: Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 4(2).

McMichael v. Wilkie (1891), 18 A.R. 464, distinguished.

Small v. Thompson (1897), 28 Can. S.C.R. 219, followed.

Judgment was directed to be entered in favour of D. against H. for the indemnity claimed, in the form usual in the case of a married woman.

APPEAL by Disney, the plaintiff in a third party proceeding, from the judgment of MEREDITH, C.J.C.P., 56 O.L.R. 606.

April 29. The appeal was heard by LATCHFORD, C.J., MIDDLETON, J.A., LENNOX, J., and ORDE, J.A.

Gideon Grant, K.C., and *Fraser Grant*, for the appellant.

R. S. Robertson, K.C., for Howich, the defendant in the third party proceeding, respondent, referred to *McMichael v. Wilkie* (1891), 18 A.R. 464; *Small v. Thompson* (1897), 28 Can. S.C.R. 219; *Mills v. United Counties Bank Ltd.*, [1912] 1 Ch. 231, 242.

Grant, K.C., in reply, referred to *McMichael v. Wilkie* (*supra*), distinguishing it from the case at bar; *Beatty v. Fitzsimmons* (1893), 23 O.R. 245, 248, 249; *Re Hamilton v. Perry* (1911), 24 O.L.R. 38; *Northern Electric and Manufacturing Co. Ltd. v. Cordova Mines Ltd.* (1914), 31 O.L.R. 221; *Wright v. Chard* (1859), 4 Drew. 673, 683, 685.

June 23. The judgment of the Court was read by LATCHFORD, C.J.:—This is an appeal from the judgment of Meredith,

App. Div.

1925.

DISNEY
v.

HOWICH.

Latchford,
C.J.

C.J.C.P., of the 27th February, 1925, dismissing the claim of the defendant in the action of *Hayward v. Disney* to be indemnified against liability asserted in that action, which was brought against him by the plaintiff upon a second mortgage on lands which he sold to the third party, subject, as he contends, to an obligation to assume and pay off the same. As against the plaintiff, Disney does not assert that he has any defence.

Within three months after he had purchased the property subject to this mortgage and to a prior mortgage for \$4,000, Disney was approached by Mrs. Howich and her husband and asked the price of his property in Toronto, whither Mrs. Howich was desirous, she says, of moving in order to be more in touch with the Jewish community than was possible at Oshawa. Disney first put upon the property which he had bought a price of \$15,500 or \$16,000. Ultimately, he says, a proposition was made to him on behalf of Mrs. Howich, by her husband, she being present at the time: "I'll give you \$15,000 if you will give me \$8,000 for my house in Oshawa." The story of Mrs. Howich and her husband is to the same effect.

An exchange was arranged on that basis. The value of Disney's equity in the Dundas street property, on the assumed value of \$15,000, having regard to the mortgages existing on the Dundas street property, amounting, as they say, to \$10,400, was \$4,600; and for the difference between this sum and the assumed value of the Oshawa property, or for \$3,400, it was arranged that he should give her a mortgage on the property which she was conveying to him. A conveyance to Disney was executed and delivered, and he made a mortgage in the third party's favour for \$3,400. Disney, in turn, executed and delivered a conveyance of the Dundas street property to Mrs. Howich. Nothing appears in the document to indicate that she was bound to pay off the existing mortgages. The learned trial Judge says, in this connection (56 O.L.R. at p. 609): "There was no agreement, expressed or tacit, that she should be; it was not intended by either buyer or seller that she should be." With these findings, for reasons which I shall proceed to state, I am, with the utmost respect, unable to agree.

His Lordship also finds (pp. 607 and 608) that Mrs. Howich was induced to take the Dundas street property on misrepresentations that the Toronto property was leased and that the rents would carry it; that these statements were mainly untrue, very misleading, relied on by the defendant (that is, Mrs. Howich), and inducing her to make the exchange. He says further (p. 608):

"There seems to have been one lease of some kind; but it was never transferred to the defendant or even produced; and, not long after this transaction, there were no tenants; the mortgagees began to enforce their heavy mortgages; and the place was really lost to the defendant; indeed was really lost when she acquired it, as she was unable to redeem it except with the aid of rents which would 'carry it.' If the plaintiff did not know that the statements were untrue and misleading, it was because he did not take the trouble to learn whether they were or not, as he easily might have done, and, even in his own interests, should have done; and so he is in substantially the same position as if he had known."

Mrs. Howich, however, did not charge fraud or seek to set aside the transaction on the ground of fraud. I should like to point out here that Howich, who advised his wife and acted for her throughout the transaction with Disney, was not inexperienced in real estate matters. He had himself a house in Oshawa, in addition to the house owned by his wife, and, a short time before the exchange with Disney, had purchased a property on Bloor street west, Toronto, in his own name, subject to two mortgages. Before the exchange with Disney was made, Howich and his wife both examined the Dundas street property, which they were shewn over by the owner. The store and garage or warehouse were at the time occupied by tenants, at the rentals stated by Disney. The apartment above the store was vacant. It had, however, been rented at the amount stated by Disney, and the sum total of the rentals, \$150, was precisely the amount mentioned by Disney to the Howiches. There was then no misrepresentation as to the amount which the premises when leased brought in. It does not appear that there were formal leases in existence, though Disney understood there was a written lease to the tenant of the store, at \$65 a month, when he had purchased the property, and rent at that rate was actually paid after Disney became the owner.

It seems to me to have been assumed that by leases Disney meant formal documents. But leases may be verbal. That all three tenements had been leased is beyond dispute. It is further to be observed that Mrs. Howich said nothing about leases until the word in the plural was suggested to her by her own counsel, who asked, "Did he (Disney) say anything about leases?" The lady answered, "He told me he has leases, and 'it is good for two or three years—I can't say how many years and it will carry you.'"

There is no evidence that Disney did not expect that the lease

App. Div.

1925.

DISNEY
v.

HOWICH.

Latchford,
C.J.

App. Div. of the store would be good for the indefinite time mentioned, and
1925. none that if the tenant vacated the premises during his term the
rent payable could have been recovered from him. Mrs. Howich
calculated all the possibilities other than vacancy of the store
and garage. She says Disney told her how much rent he was
getting.
DISNEY
v.
HOWICH.
Latchford,
C.J.

“Q. How much did he tell you? A. He said \$60 for the store, \$25 for the warehouse, and the upstairs he used to get \$60 for it, but it was not rented at the time. I figured if I get \$40 or \$45, it will carry it like I wouldn't have to go back.”

The lessee of the store was in fact paying \$65 a month.

There was, in my opinion, no ground for the finding that Disney misrepresented the property or the leases of it and thus induced the contract. The transaction is to be judged by what took place when the exchange was made, by the state of the Dundas street property at the time, as known to Mrs. Howich, and not by what happened later, when, after she had assumed possession and received the rents of the store and garage for several months, the store and garage became vacant, as the apartment had been. There being no rents to “carry” the property, by meeting the charges upon it, including the two mortgages, what had promised to be a good speculation resulted disastrously.

That Mrs. Howich and her husband both understood perfectly that the mortgages were to be assumed and paid is, I think, evident. Disney was asked in reference to a statement prepared by the solicitor who, at the instance of Mrs. Howich, had acted for both the parties in the transaction, whether the two mortgages on the Dundas street property were taken into account as part of the \$15,000.

“His Lordship: Mr. Grant, why ask that question? Nobody disputes anything of the sort. Obviously they must have been taken into account.

“Mr. Grant: I am content now with what your Lordship says.”

The solicitor deposed: “The instructions I received from Mrs. Howich were that they were assuming the existing encumbrances, and they gave me the amounts. The first was \$4,000 and the second \$6,400 or \$6,600.

“Q. And pursuant to that, did you write to the mortgagees to obtain a statement of the account?

“Mr. Robertson: That is very leading.

“Mr. Grant: I know it is; surely that is not the issue.

"A. Yes, I have letters on my file with replies from the mortgagees.

"His Lordship: There are two mortgagees, and they took it subject to the mortgages; no one says they were deceived as to the amount; I daresay they were deceived as to the profits of the property.

"Mr. Robertson: We do say, your Lordship, that we did not assume the mortgages in the sense that we agreed we were going to be personally liable to pay them.

"His Lordship: Nobody has said anything of the sort.

"Mr. Robertson: My learned friend will argue that, from what this witness has said.

"Mr. Grant: That is what this witness said.

"His Lordship: What did you say?

"A. I said the instructions I received from Mr. or Mrs. Howich were that they were assuming the two existing encumbrances upon the Toronto property.

"Q. What do you mean by 'assuming'? They did not mean to say they were paying them, did they? A. It was not discussed technically.

"Q. Well, tell me, if they instructed you, why you didn't put it in the deed? A. I don't know how that was—possibly because I didn't have particulars.

"Q. I think I know why it was not: because you didn't get any instructions to do so. A. It certainly was not. The deed was drawn as soon as I received instructions.

"Q. Then you did get instructions to put in the deed that they were to pay off the mortgages? A. I was never instructed to put in or leave out that information; it was known they were assuming those; it should be in the deed.

"Q. Why did not you put it in the deed? A. It is either an oversight on my part or the stenographer's.

"Q. Or an oversight of your memory at the present time? A. No, my Lord, it is not."

The solicitor's letter of the 8th August, 1923, produced by Mrs. Howich, refers explicitly to both mortgages as having been assumed by her. I quote part only:—

"As you will note by the within statement of adjustments, no taxes have been paid for 1923 on the property being purchased by you, and on the 29th September *you will owe Mrs. Taylor*, 300 Heath street, Toronto, one half year's interest at 7% on \$4,000, and on the 1st September *you will owe R. Duggan*, 623 Windermere avenue, Toronto, interest on \$6,400 at 7½% for six months,

App. Div.
1925.
DISNEY
v.
HOWICH.
Latchford,
C.J.

App. Div. and also the sum of \$200 on account of principal on the same
1925. date.”

DISNEY
v.
HOWICH.
Latchford,
C.J.

On her examination for discovery, read at the trial, Mrs. Howich was asked:—

“I suppose your husband received a statement of the adjustments on the deal at that time? A. My husband says yes.

“Q. What did that statement shew? You will have to inform yourself on the answer to that question. What did it shew in regard to encumbrances against the Dundas property? A. My husband says that he understands that there were two mortgages against it.

“Q. The mortgages were shewn as against it before the deal was closed. You knew about these encumbrances being on there before the deal being closed? A. My husband says he knew the two mortgages being registered against the Dundas street property before the deal was closed.”

At the trial, in cross-examination, Mrs. Howich was asked, “You were to assume the two mortgages to make up \$15,000?” and answered, “No, I was not.” Then: “How were you going to pay the \$15,000? A. Just by rent. In time I figured my boy will be able to help me out by going to work.

“Q. You were going to make the payments out of the rents? A. Certainly.”

That it had been calculated that all the rents would not be so exhausted is manifest from her answer to the next question: “Payments on the mortgages and interest? A. Not pay as much as we collected.”

Obviously Mrs. Howich was to assume and pay off the mortgages. Notwithstanding her denial, it is quite plain that she so intended, and was so understood to have intended, not merely by Disney but by her husband and her solicitor and even by herself; for, after the exchange, when she had taken possession and received rents, she paid \$200 to the holder of the second mortgage. In another aspect the assumption of the mortgages was part of the consideration payable.

It is true that the deed from Disney does not refer to the mortgages and contains no covenant on the part of the purchaser to assume and pay them off; but, having regard to the facts manifest in the transaction, there was, in my opinion, an implied obligation on her part so to do.

The law on the question was stated clearly by Lord Eldon in *Waring v. Ward* (1802), 7 Ves. 332, at p. 337:—

“If he” (the purchaser of an equity of redemption) “enters

into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

App. Div.

1925.

DISNEY
v.
HOWICH.Latchford,
C.J.

In reporting *Dodson v. Downey*, [1901] 2 Ch. 620, the learned editor in a note states, quite correctly, I think, that, according to modern ideas, the obligation mentioned rests, not upon conscience, but upon an implied contract.

In *Boyd v. Johnston* (1890), 19 O.R. 598, the principle applied in *Thompson v. Wilkes* (1856), 5 Gr. 594, was approved and applied by Boyd, C., to a case in which lands subject to a mortgage were conveyed upon an exchange, and the conveyance, while stating that the lands were subject to a mortgage, was not signed by the grantee of the equity of redemption, who was nevertheless held liable to protect the grantor from liability.

The rule is thus stated (5 Gr. at p. 595) by the learned Chancellor (Blake):—

"It is clear that the purchaser of an equity of redemption is bound, as between himself and his assignor, to pay off the encumbrances, and that quite irrespective of the frame of the contract between the parties. . . . The doctrine is not confined to mortgage transactions, which are but the particular instances of the application of the general rule that the purchaser of an estate, subject to encumbrances, is bound to indemnify the vendor against them, even though no covenant to that effect has been entered into; and it does not proceed upon any technicality whatever, but upon clear principles of reason and justice."

In *Beatty v. Fitzsimmons*, 23 O.R. 245, the principle is again recognised. The implication that the purchaser of lands subject to a mortgage is bound to pay it off or indemnify the vendor against it is said not to arise (in the absence of a covenant on the part of the grantee) from anything contained in the deed, nor from the construction to be placed upon the deed itself. It was an implication arising in that case from the facts proved by the plaintiff. It was held, however, that the implication could be rebutted by parol evidence tending to shew that no such implication or presumption could arise. Here, not only does parol evidence not rebut the implication, but, apart from a casual denial by the lady, the

App. Div.
1925.

DISNEY
v.
HOWICH.
Latchford,
C.J.

evidence is overwhelming that it was part of the bargain, part of the very consideration for it, that Mrs. Howich should assume and pay off the mortgages.

In *Walker v. Dickson* (1892), 20 A.R. 96, only the fact that the conveyance in question, while in form a deed, was in effect a mortgage, prevented the application of the equitable doctrine stated in *Waring v. Ward*. Burton, J.A., says (p. 102):—

“It is familiar law, scarcely at this day requiring a reference to authorities, that where a person purchases an estate which is subject to a mortgage, meaning at the time to buy the estate subject to that encumbrance, he is liable in equity to indemnify his vendor; it is in effect part of the purchase-money.”

It is objected that such an implied obligation is not enforceable against a married woman. *McMichael v. Wilkie*, 18 A.R. 464, on appeal, reversing the judgment of a Divisional Court (1890), 19 O. R. 739, is relied on as enunciating that proposition. The decision in that case, however, rests on quite a different point. On an exchange of lands subject to mortgage, a husband assumed to act under a general power of attorney from his wife, authorising him to sell her real estate in such manner and at such prices as he should deem proper, and generally to act in relation to her estate as fully and effectually in all respects as she could do if personally present. The appeal turned mainly on the construction of the instrument and the evidence relating to the transaction.

Hagarty, C.J.O., said (p. 467) that he could find nothing whatever in the evidence to prove that the wife had knowledge of the liability assumed in taking the lands subject to a mortgage, her husband having made the exchange without consulting her. Burton, J.A., points out (p. 468) that the power of attorney did not authorise an exchange of lands or empower the husband to enter into an engagement on the wife's part to assume the mortgage. While she personally executed the deed of her property, that document purported to be made in pursuance of a sale for a money consideration, and the learned Judge states that there was no evidence that the exchange was ever mentioned to her. He recognises the principle applicable to the case at bar, when, referring to the obligation sought to be implied, he says (p. 469):—

“I can quite understand that if it had been shewn that she was in possession of the rents and profits of the land, or that she was aware that the interest paid by her husband was being charged against her, there would be evidence on which the Court might infer such an obligation; but a deed made to her without her knowledge, subject to a mortgage, is no evidence of an agreement on her

part. She denies that she ever made such an agreement, and there is no evidence in support of it."

The denial, apparently, was only in her pleading, as she did not testify at the trial.

A decision on the question so stated was all that was necessary for the determination of the appeal. There could be no such contract, when no power existed to do that from which only a contract could be implied. There is a discussion in the judgment of MacLennan, J.A., as to whether the obligation imposed by a court of equity on the grounds stated in *Waring v. Ward* can be described as a contract or promise, but the opinion expressed seems merely *obiter* and not necessary to a decision of the case.

Whether that is so or not, the liability of a married woman has been enlarged since *McMichael v. Wilkie* was decided. At that date (1891), under R.S.O. 1887, ch. 132, a married woman, to the extent of her separate property, was liable to be sued "on any contract," and on a contract only. But by R. S. O. 1914, ch. 149, a married woman is, to the same extent, liable "in contract or in tort or otherwise," and the *dicta* in *McMichael v. Wilkie* have no longer any application.

Small v. Thompson, 28 Can. S.C.R. 219, was a case in which a married woman was grantee under a deed reciting that she was to assume a mortgage-debt on the lands conveyed to her under a contract made by her husband which she had no knowledge of at the time. She afterward assented to take under the deed and was held liable to pay the mortgage, although she had not signed the conveyance.

In *Campbell v. Douglas* (1915), 34 O.L.R. 580, the equitable obligation of a purchaser to indemnify the vendor when the amount of the mortgage is deducted from the purchase-price, and in that sense retained by the purchaser, is said by Hodgins, J.A. (p. 585), to be clearly recognised in this Province.

I would allow the appeal with costs, and direct that judgment with costs should be entered in favour of Disney against Mrs. Howich for the indemnity claimed, in the form usual in the case of a married woman. See *Hammond v. Keachie* (1897), 28 O.R. 455.

Appeal allowed.

App. Div.

1925.

DISNEY

v.

HOWICH.

Latchford,

C.J.

[ROSE, J.]

1925.

DENISON V. UNION BANK OF CANADA.

June 25. *Bankruptcy — Claim of Bank to Assets of Debtor — Securities — Assignment of Book Debts — Registration under Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29 (Ont.)—Compliance with Act—Affidavit of Execution—Sufficiency—Description of Commissioner—Hypothecation of Bills of Lading and Warehouse Receipts —Title of Bank to Goods—Right to Proceeds—Security under sec. 88 of Bank Act — Pledge—Validity — Assignment of Insurance Policies.*

A claim was made by the defendants, under securities held by them, to certain assets in the hands of the plaintiff as trustee in bankruptcy of the estate of M. R., a customer of the defendants, carrying on business as a fruit-dealer, under the name "M. R. & Co." One of the securities was an assignment of book debts, purporting to be made by M. R. & Co. M. R. signed it by impressing, with a rubber stamp, the name "M. R. & Co.," and writing his own name below it. The affidavit of execution stated that the deponent "was personally present and did see M. R. named in the . . . instrument, duly sign, seal and execute same for the purposes named therein:"—

Held, that the document, when tendered for registration, was "accompanied by an affidavit of the attesting witness thereto of the due execution thereof," as required by the Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29 (Ont.)

Held, also, that the affidavit of execution, sworn before a commissioner for taking affidavits, who signed his name, but did not add any words indicating his authority to administer an oath, was not open to objection, no statute requiring the addition of a description.

Ex p. Johnson, In re Chapman (1884), 26 Ch. D. 338, followed.

(2) The second security was described in the claim filed by the bank with the plaintiff as an hypothecation of bills of lading and warehouse receipts in respect of two car-loads of fruit, which had been bought by M. R. and had been paid for by the defendants. In fact there was no bill of lading for any fruit that was in Ontario; the bills of lading, made out to the shippers and endorsed in blank, had come to the defendants attached to the drafts for the price of the goods, and had been handed by them to M. R. so that he could sell the goods on their account:—

Held, that the defendants, having acquired title to the goods when they paid the drafts and received the bills of lading, were entitled to receive and retain the proceeds of the sale of the goods, whether such proceeds came to their hands before or after the commencement of the bankruptcy.

(3) A security given under sec. 88 of the Bank Act was a valid pledge of the goods in M.R.'s warehouse at the time of the assignment in bankruptcy, for a demand note held by the defendants; but the pledge did not create any valid security upon fruit that was not in the warehouse.

(4) An assignment of policies of insurance on the life of M. R. was declared valid and binding.

An issue sent for trial by the Judge in Bankruptcy.

The issue was tried by ROSE, J., without a jury, at Ottawa.

T. A. Beament, K.C., for the plaintiff.

E. F. Newcombe, for the defendants.

June 25. ROSE, J.:—This is an issue tried pursuant to an order made by Mr. Justice Fisher, as Judge in Bankruptcy, to determine certain questions which have arisen between the plaintiff, as trustee of the estate of Michael Raport, and the defendants, touching the claim of the defendants to priority under certain securities given to them by the bankrupt upon certain of his assets. It is admitted that there is no proof that Raport was insolvent at the time of giving the securities, and that the transaction is not open to attack under sec. 31 of the Bankruptcy Act; the nature of the objections that are taken will be stated in the discussion of the respective securities.

The first of the securities is an assignment of book debts, dated the 31st July, 1923. The question as to this is, whether there was a compliance with the Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29 (Ontario).

Raport carried on business under the name "M. Raport & Company." The assignment purports to be made between "M. Raport & Coy., of Ottawa, in the Province of Ontario, wholesale fruit merchant," called "the customer," of the first part, and the defendants, called "the bank," of the second part. Raport signed it by impressing, with a rubber stamp, the name M. Raport & Co. with a dotted line underneath, and writing his name ("M. Raport") on the dotted line. The affidavit of execution states that the deponent "was personally present and did see M. Raport named in the . . . instrument duly sign, seal and execute same for the purposes named therein." It was sworn before a commissioner for taking affidavits, who signed his name, but did not add any words indicating his authority to administer an oath. The affidavit of *bona fides* states, *inter alia*, that the assignment is not for the purpose of enabling the bank to hold the book debts "against the creditors of the said M. Raport & Co., the . . . customer."

The first point taken is that there is no affidavit of the due execution of the document, in that the deponent professes to be a witness of its execution, not by M. Raport & Coy., whose act it purports to be, but by M. Raport.

M. Raport was the "M. Raport & Coy." referred to in the document as the customer. It was he who, as stated in the affidavit, signed, sealed and executed the assignment; and when he wrote his own name below the stamped signature "M. Raport & Co." he wrote it manifestly, and as the affidavit states, for the purpose of making the document (including the signature "M. Raport & Co.") effective "for the purposes named therein." In my opinion, therefore, the document, when tendered for registration,

Rose, J.

1925.

DENISON

v.

UNION
BANK OF
CANADA.

Rose, J.

1925.

DENISON
v.

UNION
BANK OF
CANADA.

was "accompanied by an affidavit of the attesting witness thereto of the due execution thereof," as the statute requires. The statute does not say that the attesting witness must swear that he saw the document signed by any particular person. What it requires is an affidavit of "due execution." Execution by M. Raport in the name of M. Raport & Co. was due execution: the witness swears that he saw M. Raport "duly execute" the document; and the statute is complied with. The description of M. Raport, in the affidavit, as "named" in the document is unimportant. Raport, it is true, is not named in the body of the assignment; but his name appears as a signatory, and no one reading the affidavit could doubt that the M. Raport whose signature appears was the M. Raport referred to in the affidavit. The cases cited by Mr. Newcombe—*Jones v. Harris* (1871), L.R. 7 Q.B. 157, *Ex p. McHattie* (1878), 10 Ch. D. 398, *De Forrest v. Bunnell* (1858), 15 U.C.R. 370, and *Fisher v. Bradshaw* (1901), 2 O.L.R. 128—especially the last mentioned—are instructive.

The other objection to the affidavit is that the commissioner did not add his description to his signature. No statute requiring him to do so was cited. The objection is disposed of by *Ex p. Johnson, In re Chapman* (1884), 26 Ch. D. 338.

The attack upon the assignment of book debts fails.

The second of the securities in question is described in the claim filed by the bank with the assignee as an "hypothecation of bills of lading and warehouse receipts to secure a demand note, overdraft and trade paper up to \$11,166.07, dated the 31st August, 1923, and amongst others specifically assigning the bills of lading or warehouse receipts of one car-load of lemons with Denny and Company, Chicago, and one car-load of lemons with Dixon and Company, New York." It is valued at \$559.29, which seems to be the amount of the proceeds of one of the car-loads of lemons.

The document in question is written on a form intended for use in hypothecating warehouse receipts or bills of lading, and professes to assign "the warehouse receipts or bills of lading following: fruit and produce Ottawa, one car lemons with Denny & Co., Chicago, one car lemons with Dixon & Co., New York." In fact, there was no bill of lading or warehouse receipt for any fruit or produce that was in Ottawa; and the lemons that were in New York and Chicago had been bought in Europe by Raport and had been paid for by the defendants, who previously had issued a letter of credit to Raport authorising the vendors to draw upon the bank's London office for the price. The bills of lading, made out to the shippers

and endorsed in blank, had come to the defendants attached to the drafts for the price of the goods, and had been handed by the defendants to Raport so that he could sell the lemons on the defendants' account; and the defendants' title, if any, to the proceeds of the sales is derived from that transaction and not from the document referred to in the claim. That document, as far as I can see, is of no value; and I think that, as Mr. Newcombe suggested, the only declaration that can usefully be made concerning it is that the defendants, in assigning a value of \$559.29 to the security which it purported to create, overvalued their security by the amount stated.

The question as to the defendants' right to receive or retain the proceeds of the sales of the lemons is, as raised by the pleadings, only the question as to the effect of the hypothecation of the 31st August, 1923, just discussed; but evidence—and apparently all the evidence presently available—was given as to the issuing of the letter of credit, the dealings with the bills of lading, the sale of the lemons, and the handling of the proceeds; and I think that, as Mr. Justice Fisher's order was that an issue should be tried to determine all matters in dispute between the parties, it is right that I should decide as to the effect of the evidence adduced. Upon that evidence it seems to me that there is no reason for saying that the defendants were not entitled to receive and retain the proceeds of the sales of the lemons, whether such proceeds came to their hands before or after the commencement of the bankruptcy. The evidence seems to shew that the defendants acquired title to the goods in England when their London office paid the drafts and received the bills of lading; that they handed the bills of lading to Raport, whom they trusted, merely in order that he might make sales, and not with any intention of allowing him to receive or retain the purchase-money; and that, when the warehousemen in New York and Chicago made delivery of the lemons to the purchasers and received the money, they received it for the defendants. The questions discussed in *Re Dominion Shipbuilding and Repair Co. Ltd.* (1923), 53 O.L.R. 485, do not seem to arise: the defendants' title does not depend upon documents such as were there under consideration, and, as I understand it, the lemons were never in Ontario.

The third security put forward by the bank is an assignment under sec. 88 of the Bank Act. It bears the same date as the hypothecation just discussed, and it assigns the same goods as are mentioned in the hypothecation, viz., fruit and produce in Raport's

Rose, J.

1925.

DENISON

v.

UNION
BANK OF
CANADA.

Rose, J.
1925.

DENISON
v.
UNION
BANK OF
CANADA.

warehouse in Ottawa, a car-load of lemons with Denny & Co., Chicago, and a car-load of lemons with Dixon & Co., New York. It purports to be made in consideration of an advance of \$11,166.07, for which the bank is stated to hold "the following bills or notes: demand note, \$2,000; overdraft, \$4,667.05; trade paper, \$4,499.02."

The "demand note" referred to was the balance due in respect of a note for \$8,500, dated the 15th October, 1921, on account of which payments had been made from time to time until the principal had been reduced to the amount stated. The evidence is that this note represents an advance made on the day of its date. There is at the foot of it a promise by M. Raport & Co. to give security under sec. 88, from time to time as demanded, upon the goods mentioned in an application for credit, dated the 1st September, 1921, which goods are seen, upon reference to the application for credit, to be "all the apples, oranges, lemons, bananas, plums and . . . vegetables" which at the date of the application are or while any advances remain unpaid may be owned by M. Raport & Co. and which are or may be in their warehouse, 60 and 62, George Street, Ottawa. In so far, then, as the document in question is a pledge of the fruit and vegetables in Raport's warehouse, as security for the \$2,000, it seems to be perfectly valid; all the requirements of secs. 88 and 90 of the Bank Act, even upon the most restricted of the interpretations suggested in *Clarkson v. Dominion Bank* (1919), 58 Can. S.C.R. 448, are met: the loan represented by the note was made upon the written promise or agreement of the borrower, signed at the time of the specific advance, to give security upon the specific goods.

The "overdraft" was allowed to Raport as the result of his application dated the 18th October, 1922, for a "revolving line of credit" of \$16,000 for the then current season, which season was to be considered to terminate in five months from the date of the application. The document contains a promise to give security from time to time on demand, covering the apples, oranges, fruit, produce, etc., in Raport's warehouse in Ottawa. The whole \$16,000 was made available to Raport. As deposits were made by him they were applied in payment of the earlier advances. By the time of the taking of the security in question, these deposits had sufficed to pay an overdraft of \$5,482.58, which there had been at the time of the application for the credit, as well as all the advances made by the bank during the season for which the credit was given, except the \$4,667.05 which the document attacked purports to secure under sec. 88. The \$4,667.05 seems, then, to be the balance of a

liability contracted upon the written promise that the security would be given to the bank.

Counsel for the plaintiff contends that *Clarkson v. Dominion Bank* decides that the pledge given under sec. 88 of the Bank Act is invalid as a security for the overdraft; but the question thus raised is one which it does not seem to be necessary to decide, and I think it better to refrain from expressing unnecessarily any opinion upon the vexed question as to what actually was decided in the *Clarkson* case and as to the circumstances in which a pledge under sec. 88 will be valid as a security for sums advanced by a bank to a customer who has been given a "revolving line of credit" such as had been extended to Raport.

The pledge in question did not create any valid security upon the lemons that were in New York and Chicago. One of several amply sufficient reasons for this statement is that there had been no promise by Raport to give security under sec. 88 upon anything other than goods in his own warehouse. Another is that, if my holding as to the effect of the bank's acquisition of the bills of lading is correct, the property in the lemons had passed to the bank before the pledge was taken. Therefore, for practical purposes the question as to the effectiveness of the document is reduced to a question as to whether the goods that were in Raport's warehouse at the time of the assignment in bankruptcy were pledged; and, as the value of those goods was, as I understand, less than the \$2,000 (the balance due in respect of the note) for which, in my opinion, they were pledged validly, there seems to be no reason for considering whether the pledge of them as security for the overdraft was effective.

What has just been said as to the overdraft applies also to the trade paper. There may or may not have been a sufficient promise to give security upon the goods in Ottawa for Raport's liability upon this paper; and the security under sec. 88 upon these goods for that liability may or may not have been valid; but, even if the security is valid, it is worth nothing over and above the amount required to pay the note.

The only other security mentioned in the claim is an assignment of insurance policies upon Raport's life. The attack made upon this security in the pleadings was abandoned at the trial.

There will be judgment declaring that the assignment of book debts was valid and effective for the purposes therein stated; that the defendants, in their affidavit filed with the trustee, overvalued the hypothecation of bills of lading and warehouse receipts by

Rose, J.

1925.

DENISON

v.

UNION
BANK OF
CANADA.

Rose, J.

1925.

DENISON

v.

UNION

BANK OF

CANADA.

\$559.29; but that, apart from such hypothecation, they are entitled to be paid (or to retain, if they have received) and to apply upon their claim against M. Raport & Co., the proceeds of the sales of the lemons in New York and Chicago referred to in the hypothecation; that the security given under sec. 88 of the Bank Act was a valid pledge of the goods in Raport's warehouse for the demand note for \$2,000 therein referred to; and that the assignment of insurance policies was valid and is binding upon the plaintiff.

The plaintiff must pay the costs.

[MEREDITH, C.J.C.P.]

RE SCOTT.

1925.

June 4.

Will — Construction — Bequest of "Entire Property" to Wife with "Power of Control"—"Wish" that Sister should "Inherit what Remains" at Death of Wife—Validity as Gift—Certainty—Trust—Interpretation of Words in Wills.

A. S. by his will gave to his wife his "entire property both real and personal to have and to hold with full power to control the same." A subsequent clause of the will was as follows: "It is also the wish of the said A. S. that . . . S. H. shall at the time of the death of . . . I. S." (the wife) "inherit whatever property remains in her hands at the time of her death." S. H. was the testator's sister. The widow, dying intestate, made no disposition of what remained:—

Held, that no trust was created by the will; the widow was to do nothing; she had full power of control, which could be exercised during her lifetime only; and upon her death what remained went to the sister—"inherited" from the testator.

Held, also, that there was nothing uncertain in the gift: "what remains" is a certain gift.

Remarks upon the danger of following the interpretation put upon some other will in some other case, and upon the changes in the meaning of words and expressions which come about in the course of time.

MOTION by the administrator of the estate of Ida Scott, deceased, for an order determining certain questions as to the meaning and effect of the will of Arthur Scott, the deceased husband of Ida Scott.

June 2. The motion was heard in the Weekly Court, Toronto. *G. M. Huycke*, for the applicant.

S. H. Bradford, K.C., for the adult children of Sarah Higgins. *Lyle Ramsey*, for the Official Guardian.

June 4. MEREDITH, C.J.C.P.:—Two questions are raised, and were argued, in this matter: (1) whether there is any gift by the testator to his sister Sarah Higgins in the will in question; and (2), if so, whether the gift is invalid on account of uncertainty.

The testator concluded the giving part of his will with these words: "It is also the wish of the said Arthur Scott that the said Sarah Higgins shall at the time of the death of Mrs. Ida Scott inherit whatever property remains in her hands at the time of her death."

"Mrs. Ida Scott" was the testator's wife; and at the beginning of the giving part of his will he had given, and bequeathed to her "my entire property both real and personal to have and to hold with full power to control the same."

Meredith,
C.J.C.P.

1925.

RE SCOTT.

For the administrator of Ida Scott's estate and on behalf of her next of kin, it is contended that the first quoted words express no more than the hope that the widow would bequeath to Sarah Higgins "whatever property remains."

But that, in my opinion, is not so.

The case was argued as if it were one in which Sarah Higgins could not be entitled to anything unless the will made the widow a trustee for her; and it was contended that the words used were not strong enough to create a trust.

If that were so, three things should be borne in mind: that, though, like blades of grass, wills may be very much alike, also like blades of grass, no two are quite alike; and it is a dangerous thing to follow, without the utmost care, the interpretation put upon some other will in some other case, however much the wills may at first appear to be alike; also that manners—including manners of speech—and the meaning of words, change from time to time, so that interpretations of words and expressions in days gone by may be quite "out of date" now. At one time a master said to his servant, "Do this," and he did it; in these days a master is much more likely to say, "I wish you would do this:" it is the same command, but in the one case "unvarnished" and in the other supposedly "sugar-coated;" and in the case of husband and wife the command is likely to be much more heavily "honeyed."

But I cannot think that any such question is involved in this case. It is not a case of trust. The widow is to do nothing. She has "full power of control," which can be exercised during her lifetime only. Upon her death what remains is to go to Sarah Higgins. If it does not, there is an intestacy as to that and it goes to the testator's next of kin. And it will be observed that the testator's sister is to "inherit" it. She could not inherit from her sister-in-law. She could inherit from the testator, her brother, only. Whether the widow might have bequeathed what remains, or not, is not material; she did not; and "control" can hardly comprise "bequeath."

Thus dealt with, the whole will is brought into harmony, and there is no intestacy or suspicion of intestacy; there is a reasonably plain and entirely consistent disposition of "the whole estate and effects" of the testator.

Upon the other question there also seems to me to be no obstacle in the legatee's way.

There were at one time cases decided in accord with the contentions of the administrator and next of kin of the widow, but they

are not followed; the cases in which the opposite conclusion was reached govern now: see *Shearer v. Hogg* (1912), 46 Can. S.C.R. 492.

And apart from cases: there is nothing uncertain in the gift: "what remains" is a certain gift, though that which is given may sometimes be hard to find, as it may be with any gift. But here there is no difficulty of any kind; the administrator has testified that "all the property left by Mrs. Ida Scott can be identified and is in my hands as the estate which she received from her husband."

An order may go accordingly; but it shall bind only those who appeared on this motion, those who were regularly served with notice of the motion and did not appear, and those—if any—as to whom service was lawfully dispensed with.

[See *Re Walker* (1923), 56 O.L.R. 517.]

Meredith,
C.J.C.P.

1925.

RE SCOTT.

[APPELLATE DIVISION.]

REX v. CLARENCE F. SMITH.

1925.

June 27.

Criminal Law—Director of Bank—Conviction for Negligently Approving of or Concurring in False Statement or Return Made to Minister of Finance—Bank Act, 1913, sec. 153(3)—Return Required by sec. 54—"Outgoing Directors"—Board of Directors—Absence of Actual Knowledge of Falsity—Failure to Attend Meetings of Board—Absence of Dishonesty—Reliance on Officers of Bank as to Correctness of Return.

The defendant became a director of the Home Bank of Canada in 1919 and continued as such until the bank was declared insolvent in August, 1923. He was tried before a County Court Judge, sitting without a jury, upon charges of offences against sec. 153 (a), (b), and 2 of the Bank Act, 1913; he was acquitted upon the first and second charges, and convicted upon the third, which was, that he did negligently prepare, sign, approve, or concur in an account, statement, return, report, or document (the annual statement June, 1923) respecting the affairs of the bank, containing false or deceptive statements, made and sent to the Minister of Finance, contrary to the provisions of sec. 153(2):—

Held (by the majority of the Court), assuming the falsity of the statements complained of and the approval of or concurrence in them by the defendant to be established by the evidence, that he could not, in all the circumstances, be found guilty of negligence in so approving or concurring within the meaning of sec. 153(2).

Dovey v. Cory, [1901] A.C. 477, and *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 664, 853, applied.

"Outgoing directors," as used in sec. 54 of the Act, means the board composed of the outgoing directors; and the statement is made and submitted by the board as such.

1925.
—
REX
v.
CLARENCE F.
SMITH.

Acquittal on the first two counts involved a finding by the County Court Judge that the defendant had no actual knowledge of the false or deceptive statement; and such knowledge was not to be attributed to a director who did not actually possess it.

Failure to attend meetings of the board did not render the defendant responsible for what took place in his absence.

To arrive at a conclusion as to whether or not approval or concurrence was negligently given within the meaning of sec. 153(2), all the circumstances in which it was given by the defendant must be taken into consideration, and these included his actual knowledge or lack of knowledge of the truth, the opportunities he had of acquiring such knowledge, the trust that he placed in those associated with him in the conduct of the bank's business, and the deception practised on him by them.

The evidence established the absence of any dishonesty on the part of the defendant in his dealings with the bank; he had no knowledge that would enable him to detect any error, and had confidence in the officers of the bank who represented to him and others present at the annual meeting of shareholders the correctness of the return and other documents.

The conviction was, therefore, quashed.

ON the 24th July, 1924, the defendant, then a prisoner in close custody, was charged before his Honour Judge COATSWORTH, Judge of the County Court of the County of York, exercising criminal jurisdiction under the provisions of the County Court Judges' Criminal Courts Act and Part XVII. of the Criminal Code, for that he, Clarence F. Smith, being then a director of the Home Bank of Canada, a chartered bank having its head office at the city of Toronto, did, on or about the 26th June, 1923, at the said city, make a wilfully false or deceptive statement in an account, statement, return, report, or other document, respecting the affairs of the said bank, made and sent to the Minister of Finance and Receiver-General for the Dominion of Canada and received by the said Minister of Finance and Receiver-General, and did thereby commit an indictable offence, contrary to the provisions of the Bank Act, 1913, 3 & 4 Geo. V. ch. 9, sec. 153 (a).

And that he, the said Clarence F. Smith, at the time and place aforesaid, being then a director of the Home Bank of Canada, unlawfully did use a false or deceptive statement, return, report, or other document respecting the affairs of the said bank, made and sent to the Minister of Finance and Receiver-General and received by the said Minister of Finance and Receiver-General, with intent to deceive or mislead the said Minister of Finance and Receiver-General and other persons, and did thereby commit an indictable offence, contrary to the provisions of the Bank Act, 1913, 3 & 4 Geo. V. ch. 9, sec. 153 (b).

And that he, the said Clarence F. Smith, at the time and place

aforesaid, being then a director of the Home Bank of Canada, did negligently prepare, sign, approve, or concur in an account, statement, return, report, or document respecting the affairs of the said bank, containing false or deceptive statements, made and sent to the Minister of Finance and Receiver-General and received by the said Minister of Finance and Receiver-General, and did thereby commit an indictable offence, contrary to the provisions of the Bank Act, 1913, 3 & 4 Geo. V. ch. 9, sec. 153 (2).

1925.
—
REX
v.
CLARENCE F.
SMITH.

The defendant elected to be tried by a Judge without a jury and pleaded not guilty.

He was tried accordingly before COATSWORTH, Co.C.J., and was, on the 7th November, 1924, found guilty of negligence on the third count, and not guilty on the first two counts.

The learned County Court Judge, on the 7th November, 1924, gave written reasons as follows:—

The accused is charged in three counts: that on the 26th June, 1923, being a director of the Home Bank of Canada, he did, in the directors' yearly statement: (1) make a wilfully false or deceptive statement; (2) unlawfully use a false or deceptive statement; (3) negligently sign, approve, or concur in an account containing false or deceptive statements.

The statement in question is supposed to shew a clear and full account of the business of the bank for the year, and of the assets, resources, and liabilities, in a form required by the Bank Act, and to be presented at the annual meeting of the shareholders and filed with the Minister of Finance thereafter.

We appear to have come to the point in these trials* where the falsity or deceptiveness of the statement in question is admitted or taken for granted; the only question remaining being to fix responsibility.

Therefore, upon the evidence I find the statement referred to in the charge-sheet to be false or deceptive, within the meaning of sec. 153 of the Bank Act, 1913.

The accused pleads want of any personal notice or knowledge of the falsity of the statement, and alleges deception by the leading officials in charge of the bank's business.

He was elected a director at the annual meeting of the shareholders in June, 1919, and yearly thereafter until the suspension.

During his term of office, June, 1919, to September, 1923, there

* The chief accountant and the auditor of the bank had been tried by the learned County Court Judge upon charges of offences against the Bank Act before the trial of Smith.

1925.
REX
v.
CLARENCE F.
SMITH.

were held 144 meetings of the board. He was present at 54 of these and absent from 90 meetings.

He became a borrower from the bank in September, 1919, and continued to borrow until the debt amounted to about \$136,000. It was apparently fully secured, and has been paid off since the suspension. He was also a guarantor for the United Sales Oil Company, in which he was interested, to the extent of about \$60,000, and on the failure of that company had to make good what was then owing to the bank.

Sections 19, 29, and 30 throw upon the directors the whole responsibility for the management of the bank's business and the employment of such clerks and servants as they consider necessary.

Section 54 and its subsections and sec. 55 provide for an annual statement to be submitted by the directors, and set forth in detail what it must contain. It is important to note that it is a directors' statement and not an officers' statement, as it is the annual statement of the directors dated the 31st May, 1923, which is the basis of the charges herein.

The directors, in pursuance of the authority and duty laid upon them by the statute, enacted, promulgated, and had printed, by-laws and a most elaborate set of 216 rules and regulations directing the manner in which the officers and branch officers should perform their functions and the system of daily, weekly, monthly, quarterly, half-yearly, and other reports, which must be made.

Looking over these rules and regulations and admiring their thoroughness and completeness, one would say that the directors had left nothing undone in laying the foundation for a safe and satisfactory conduct of the business of the bank. As an extra precaution, the by-laws, which were brief, were to be read each year at the first meeting of the directors after the annual meeting. The records shew that they were never read but taken as read. The same spirit which evolved this perfunctory discharge of the obligation to have the by-laws read yearly to the board seems to have been manifested throughout the work of the directors.

Satisfied with having published such a splendid set of rules and regulations, it would appear that the accused as a director never took any trouble or made any inquiry to see that they were carried out, but left the bank to run itself.

The shareholders had a right to expect from him the vigilance that a reasonably prudent and careful business man would exercise about his own business and concerning the work and balance-sheets and yearly statements of his bookkeepers and auditors.

No such reasonably prudent and careful business man would fail to go beneath the surface of the statement and balances to ascertain for himself that they represented a clear and full statement of his business.

1925.
REX
v.
CLARENCE F.
SMITH.

The rules and regulations were merely a beginning, and should have been followed up by the receipt of complete and satisfactory assurances that they were observed and carried out by the officers of the bank. There is no evidence that the accused took the steps that a reasonably careful and prudent business man should take to satisfy himself at any time of the actual condition of the affairs of the bank and correctness of the directors' yearly statement.

It cannot be overlooked that at the date of suspension the savings accounts numbered 44,864, in which the average deposit was \$264.75. Of these savings accounts, 42,138 were under \$1,000. The current accounts numbered 7,207, of which the average deposit was \$579.75. Of these current accounts, 6,780 were under \$1,000. Any sympathy one might feel in the matter at all is quite exhausted in the consideration of these thousands of small depositors who entrusted their savings to this bank.

The question now arises: Admitting all the foregoing, how far is the accused in this case, under the circumstances, liable to be found guilty as charged in connection with the yearly statement?

Knowledge of the bank's affairs by reason of the requirements of the Act must be attributable to each director to the extent necessary to live up to the provisions of the Bank Act. He cannot be heard to say, "I did not know" or "I was not informed" or "I was absent from the meeting where it took place." I have no hesitation in finding that when a business man like the accused accepts, year after year, election and compensation as a director, he fails entirely in his duty when, during a period of four years covering his membership on the board, there were 144 meetings held and he was present at only 54, or about one-third of them. It is idle to contend that a man's neglect of an obvious duty renders him irresponsible for what took place in his absence. This, however, is only one small link in the chain of responsibility resting upon the accused.

There is no evidence of any activity on his part to discharge his important duties as director. He is apparently trying to reconcile himself to a very formal fulfilment of his obligations.

The rules and regulations shew clearly that the directors were quite aware of their high functions. You cannot pass a by-law and leave it to run itself.

There is no provision for the statement in question being made

1925.
REX
v.
CLARENCE F.
SMITH.

by a part or majority of the directors. It is "the directors"—meaning all of them.

If he could not or did not desire to live up to the requirements of the Act, it was open to him at any time to resign, and there are complete provisions for replacing such an one on the board.

It was his duty under the Act to acquaint himself fully in a general way with the business and have a knowledge, if not a familiarity, with its important transactions.

If the accused had gone just one step back in the books behind the statement in question herein, he would have found out everything. A demand for a list of debts over \$10,000, or debts due by directors and their companies, a demonstration of the profit and loss account or the rest account, or shewing the right to dividends, would have resulted in an exposure.

I find that, having regard to the duty and responsibility of the accused under the Bank Act, and the wide powers and authority with which he was clothed as director, he did not act as a reasonably careful and prudent business man and probe behind the statement in question to its sources to ascertain, as he might readily have done, whether it contained a clear and full statement of the liabilities and assets and resources of the bank; and, having failed in this obvious duty, he was guilty of negligence.

Also that the minutes of the meetings which he attended or minutes of former meetings read revealed that he had clear and ample notice of the debts that were growing in such great proportions—there was ample information to put him on inquiry as to what was going on and the prospect for any of the increasing debts being paid or properly secured. He was present when all or practically all of the large debts, accounts, and securities were discussed.

The personal dealings of the accused after he became a director seem to indicate that he went on the board for his own purposes.

In correspondence with the general manager he complained about being pressed for payment when others were not. This indicates clearly that he was aware of the other directors' borrowings, and in his opinion not on such good security as his own. The aggregate of loans to directors and their companies and friends was nearly \$8,000,000.

He had, moreover, personal knowledge of loans and debts which finally brought on a crisis. A series of eight letters passed between him and the general manager from the 8th June, 1920, to the 17th March, 1923, indicating not only information, but

that he was taking part in negotiations about some of them. He also became a shareholder and director in the Western Canada Pulp and Paper Company, and as such must have been aware of the relations between that company and the bank.

I, therefore, find the accused guilty of negligence on the third count, and not guilty on the first two counts.

The defendant appealed from his conviction to the Appellate Division of the Supreme Court of Ontario.

April 22, 23, 24, 27, 28, and 29. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

A. C. McMaster, K.C., and J. M. Bullen, for the appellant, discussed the facts and the reasons of the County Court Judge, and said that the Court had to find whether or not the conduct of the appellant was negligent—whether it was necessary for him, in order to be safe, to make inquiry about everything and to know about everything in the bank. No ordinary business man, having a business of the volume that the bank had, would go into every detail, or perhaps into any item, unless he had some reason for doubting it. The appellant did not sign the statement, and was not present at the meeting of directors at which the statement was presented by the assistant general manager and approved and adopted by the board as the statement to go before the shareholders. He was present at the shareholders' meeting on the 26th June, and that is the only fact proved against him. What occurred at that meeting is not proved. The minutes do not shew what happened. In a criminal prosecution for negligently approving or concurring, active approval or concurrence must be shewn. The minutes are not evidence against the appellant. They were not proved as the minutes of the meeting, nor were the facts stated in the minutes proved. The minutes were not sworn to as a correct record, and are not evidence against the appellant: see *Hill v. Manchester and Salford Water Works Co.* (1833), 5 B. & Ad. 866, 875. Something more than an inference is needed—it must be proved that the appellant concurred. The report or statement was adopted, the appellant did not move or second the adoption, and the fact that he was at the meeting does not establish that he was there at the time of the adoption. Section 54 of the Bank Act shews what the annual statement must contain. There is no greater responsibility upon a bank-director than upon any other director. The views of the House of Lords as to the duties of a bank-director are stated in *Dovey v. Cory*, [1901] A.C. 477. The

1925.

REX

v.

CLARENCE F.
SMITH.

App. Div. officers of the bank were interested in deceiving the directors.
 1925. Mere non-attendance at board meetings is not negligence on the
 REX part of a director: *Re Montrotier Asphalt Co., Perry's Case*
 v. (1876), 34 L.T.R. 716, 717. This appellant lived in Montreal,
 CLARENCE F. and could not be expected to attend as many meetings as those
 SMITH. directors who lived in Toronto. A director may well place special
 reliance upon the report of the auditor: subsec. 19 of sec. 56 shews
 what are the duties of the auditor. The appellant did not go into
 the witness-box; but, whatever inference should be drawn from
 that, it should not be inferred that he made no inquiry into the
 affairs of the bank. If some witness had said that the appellant
 made no inquiry, and if he then did not go into the box to deny
 that, an unfavourable inference might be drawn, but there was
 no evidence at all upon the subject. The appellant had no knowl-
 edge of the bank's heavy losses. There was evidence as to his
 knowledge and conduct in respect of the Barnard account, and
 in that case he did everything he could to save the bank from
 loss. The appellant was deceived by the president and general
 manager, who naturally concealed from the directors the facts
 in connection with loans of the bank's money to concerns in which
 they (the president and general manager) were interested and
 losses in respect of which caused the downfall of the bank. In
 order to establish criminal liability, a culpable state of mind
 must be shewn: *Chisholm v. Doulton* (1889), 22 Q.B.D. 736;
Frailley v. Charlton, [1920] 1 K.B. 147; *Sherras v. De Rutzen*,
 [1895] 1 Q.B. 918; *Dovey v. Cory*, [1901] A.C. 477, at p. 493.
 Something more, rather than something less, must be shewn in a
 criminal case. Reference to and discussion of the cases as to the
 inference to be drawn from the fact that a witness does not testify
 on his own behalf: *Rex v. Clark* (1901), 3 O.L.R. 176, 181; *Rex*
v. Nerlich (1915), 34 O.L.R. 298, 312; *Rex v. Dumont* (1921),
 49 O.L.R. 222, 234; *Mash v. Darley*, [1914] 3 K.B. 1226; *Rex v.*
Marks Feigenbaum, [1919] 1 K.B. 431. All these cases, except
 the *Nerlich* case, dealt with the inference as matter in corrobora-
 tion. Any inference that the appellant did not inquire would be
 unfair in view of the inquiry which he did make in connection
 with the Barnard transaction.

D. L. McCarthy, K.C., *McGregor Young*, K.C., and *J. C. McRuer*, for the Crown. The documents which came before the annual meeting on the 26th June, when the appellant was present, were: (1) the profit and loss account; (2) the statement of assets and liabilities; (3) the auditor's report; (4) the directors' report; (5) the president's address; and (6) the general manager's

comments. These were afterwards printed and a copy was sent to the Minister of Finance and to each director. In every one of these documents false statements appear; and the evidence connects them with the appellant, or with meetings at which he was present, or with transactions in which he was himself engaged. [References to the evidence.] In the Toronto office there were six large accounts, aggregating \$8,000,000. These were all frozen accounts. Interest was not paid upon any of them, but every year interest was capitalised, and the accounts were treated as if the interest were paid and included in the profits of the bank, and thus, while making an annual loss of \$600,000 upon the business done by the outside branches, the bank paid dividends, depleted its capital and its reserve and took the depositors' money. All this the appellant should have known. If the directors had asked for a list of bad and doubtful debts, they would have pricked the bubble. One intelligent inquiry would have divulged the rottenness of the whole management of the institution. The information as to all this was available. If the appellant did not obtain it, he was negligent. If he did know, he was guilty of worse than negligence. Negligence is a matter of degree, depending very largely upon the circumstances of each case. No director should have approved of or concurred in a statement required by sec. 54 of the Bank Act, without being in a position to say whether it was right or wrong, generally speaking. The appellant's negligence was in approving and concurring in the report to the shareholders at the meeting of the 26th June. To rid himself of the imputation that he concurred, he should have protested at that meeting and stated that he took no part in the report. He knew of these large frozen accounts; they came before him, as a member of the board, from time to time; and the slightest inquiry on his part would have led to enough knowledge to put him upon his guard. As a matter of law, no director should approve the annual statement without knowing what the securities held by the bank are. No director could properly declare dividends if he did not know something about the call and current loans. The call loans were entirely in the Toronto branch; and, in the absence of a report or some information as to the condition of this branch and the earnings of the bank, no director should have taken part in declaring dividends. All the directors were interested in companies which had borrowed from the bank. They must have had some knowledge of what was going on in the bank—they cannot load everything upon the president and general manager. They were all utilising their positions for the purpose of getting accommodation from the bank. The stock.

App. Div.

1925.

REX
v.CLARENCE F.
SMITH.

App. Div.
 1925.
 REX
 v.
 CLARENCE F.
 SMITH.

property, affairs, and concerns of the bank are to be managed by directors: sec. 19 of the Bank Act. The directors cannot delegate the duties of the management except as provided in the Act: see secs. 29 and 30. Section 18 enables the shareholders to pass by-laws. In the case of this bank, by-laws were passed by the shareholders and by-laws and regulations by the directors. The appointment of officers, clerks, and servants is for the purpose of carrying on the business of the bank: sec. 30. There are two distinct lines of management. The policy of the bank is controlled by directors; only directors can declare dividends; but the ordinary banking business is transacted by officers. The important section is 54: the statement required by it is not an officers' statement, but purely and entirely a directors' statement; and the statement is by the whole of the board, no matter who signs it. In this case the president and general manager signed and no one else. By sec. 54, a direct responsibility is placed upon the directors to inform themselves of the general condition of the affairs of the bank; and the shareholders and the Minister are to look to the directors personally, quite apart from the officers of the bank, to give their version of the bank's affairs. The items enumerated in subsec. 2 are matters peculiarly within the province of the directors. The rest or reserve fund is certainly such a matter. In this case the amount which was said to be the rest or reserve was false—the reserve had been wiped out. The declaring of dividends is of course for the directors: sec. 57. Other matters to be included in or accompanying the statement are set out in the subsections. The directors are required to make returns of this nature. They are the custodians of public funds; and are made responsible in order to prevent just what happened in this case. They must not merely accept the statements of the officers, but must make inquiry, so that the statement which goes to the shareholders, the public, and the Minister, shall clearly shew the true condition of the bank. Reference to sec. 54 as it appeared in the Bank Act, R.S.C. 1906, ch. 29. Subsections 2, 3, 4, and 5 were added subsequently. *Dovey v. Cory*, *supra*, is first reported under the name *In re National Bank of Wales Ltd.*, [1899] 2 Ch. 629. The case is distinguishable. The director there was liable only for wilful default, and he gave evidence shewing the particular steps which he took to ascertain the true condition of the bank, and it was upon this evidence that he was found not to be liable. In *Rex v. Lovitt* (1907), 13 Can. Crim. Cas. 15, the Nova Scotia Court was simply dealing with the question of wilful default under the old Act. *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 664, 853, is a very

useful case—most of the questions arising in this case are discussed there. *Prefontaine v. Grenier*, [1907] A.C. 101, is a decision under the Bank Act of 1906, according to which the directors are liable only for wilful default. By sec. 153 of the Act of 1913, the obligation of directors has been extended so as to make them liable for negligence. It must not be forgotten that this is an appeal, and that the verdict of the jury or Judge cannot be set aside unless it is unreasonable or not supportable on the evidence: *Rex v. De Bruge* (1924), 55 O.L.R. 507. There was a positive statutory duty to make a report; that is, there was a duty to act, as distinguished from a duty to sit still and do nothing. If the appellant did not actually take part in the making or preparation of the report, he allowed certain officers to sign on his behalf, and subsequently, at the annual meeting, adopted and approved and concurred in what they had done for him, knowing that this report and the minutes of the meeting, containing the directors' statement as to the financial condition of the bank, would be sent to the Minister. Where a director is called upon to act and allows others to act for him, and subsequently hears the result of their action, whether at the time of, or at some time subsequent to the action, he must be taken to have approved or concurred, unless he actually dissents. The finding of the learned trial Judge is right and should be affirmed.

McMaster, K.C., in reply. If it was intended to be required that the Minister should be assured that each director had assented to the report, there should have been some provision for recording and transmitting the vote. In the absence of any such provision, it would appear that what is required is the action of the board, which can always act by a majority. When it is said that the board knew that there were \$8,000,000 frozen assets, and knew the state of several of the large accounts, that does not touch the question before the Court. What the appellant knew is the important thing; and, even if the minutes are admissible as against him, nothing contained in them brings home to him any knowledge of these accounts. [The remainder of the reply was upon the facts.]

June 27. The judgment of the majority of the Court was (by direction of the Chief Justice) read by SMITH, J.A.:—The accused is a resident of Montreal, and it appears was managing director of a trust company. He became a director of the Home Bank in June, 1919, and continued as such till its failure in 1923. The charge against him is that, being such a director, he, at the city of Toronto, did make a wilfully false or deceptive statement in an

App. Div.

1925.

REX
v.CLARENCE F.
SMITH.

App. Div. account, statement, return, report, or other document respecting
1925. the affairs of the bank, made and sent to the Minister of Finance
and Receiver-General of the Dominion, contrary to the provisions
of sec. 153 (a) of the Bank Act; secondly, that he did unlawfully
CLARENCE F. use such statement contrary to the provisions of sec. 153 (b) of
SMITH. the Bank Act; and, thirdly, that he did negligently prepare, sign,
v. approve, or concur in, an account, statement, return, report, or
Smith, J.A. document respecting the affairs of the said bank, containing false
or deceptive statements, made and sent to the Minister of Finance
and Receiver-General for the Dominion, contrary to the provisions
of sec. 153 (2) of the Bank Act.

On the first two of these counts the accused was acquitted by the learned County Court Judge, but was convicted on the third count.

The false and deceptive statements complained of are alleged to be contained in the annual statement of the bank, dated the 31st May, 1923, and the profit and loss account annexed made pursuant to sec. 54 of the Bank Act, and in the directors' report, a copy of each of which was sent to the Minister with a copy of the minutes of the annual general meeting, as provided by that section.

The annual statement and the profit and loss account were prepared, at the instance of the general manager, by the chief accountant, Ocean G. Smith, and his assistant, Gibbs, and were signed by the general manager and the president, Daly; but, owing to the illness of the general manager, were presented to the board of directors at a meeting held on the 19th June, 1923, by Mr. Calvert, the assistant general manager, when they were approved. The accused Smith was not present at that meeting of the board.

The auditor, Mr. Jones, pursuant to sec. 56 (20), made his report, which was attached to this statement, certifying to its correctness, in the form provided by that subsection. This statement, profit and loss account, and auditor's report, were presented by Mr. Calvert to the annual meeting of the shareholders held at Toronto, on the 26th June, 1923, and adopted. The accused was present at this meeting, and printed copies of the statement were on the chairs. There is no evidence as to what part, if any, Smith took in the proceedings.

The learned County Court Judge has held that these documents contained false and deceptive statements, but does not expressly find that the accused approved or concurred in these statements. He seems rather to have proceeded on the ground that, because sec. 54 provides that "the outgoing directors shall sub-

mit a clear and full statement of the affairs of the bank," the accused is to be taken as having prepared or approved of the statement passed at the board meeting of the 19th June, 1923, even if not present, because he says: "There is no provision for the statement in question being made by a part or majority of the directors. It is 'the directors'—meaning all of them." I am quite unable to agree with this view. In my opinion, "outgoing directors," as used in sec. 54, simply means the board composed of the outgoing directors; and the statement is made and submitted by the board as such, and not by the individual members. There is provision for only one statement, and if there is a difference of opinion about it among the members of the board that statement is what the majority adopts, which becomes a statement of the board to be submitted to the meeting.

Assuming, however, that proof of the presence of the accused at some stage of the annual meeting where copies of the statement were on the chairs and where it was adopted, without proof of his presence at the actual time when it was adopted, and without actual proof of his attitude towards it, was sufficient proof of his concurrence in the statement, the question arises whether, under all the circumstances, he negligently concurred. Acquittal on the first two counts is a finding by the learned Judge that the accused had no actual knowledge of the false or deceptive statement, but he thinks that knowledge must be attributed to each director to the extent necessary to live up to the provisions of the Act, and that he cannot be heard to say, "I did not know" or "I was absent." If this were so, no director could escape, under any circumstances, if any untruth should creep into an annual statement. The Bank Act requires a statement true in all respects, and the rule thus laid down attributes to every director knowledge of what is correct, and consequently knowledge of what is false, whether he in fact has it or not.

The learned Judge proceeds to say that the accused entirely failed in his duty in being present during his term at only 54 out of 144 meetings, and that it is idle to contend that his neglect of an obvious duty renders him irresponsible for what took place in his absence. With deference, I am unable to agree with these propositions. In arriving at a conclusion as to whether or not approval or concurrence was negligently given within the meaning of subsec. 2, all the circumstances under which it was given by the accused must be taken into consideration, including his actual knowledge or lack of knowledge of the truth, the opportunities he had of acquiring such knowledge, the trust that he placed in those

App. Div.

1925.

REX

v.

CLARENCE F.
SMITH.

Smith, J.A.

App. Div. associated with him in the conduct of the business of the bank,
1925. and the deception practised on him by them.

REX
v.
CLARENCE F. SMITH.
Smith, J.A.

The evidence establishes the complete absence of any dishonesty on the part of the accused in his dealings with the bank. While a director, he became a large borrower from the Montreal branch of the bank, the account at one time reaching as high as \$136,000; but the account was, as Mr. Scott, the manager, testifies, at all times amply secured, the transactions were all good banking, and the loans were all paid in full, as well as a loan to a company which he had guaranteed. The annual statement and profit and loss account presented at the annual meeting of the 26th June, 1923, were prepared by the chief accountant and his assistant, and were signed by the general manager and the president, and had annexed to them the report of the auditor, Jones, certifying to their correctness, and were presented by the assistant general manager. The accused was present and saw these for the first time. The loans, securities, liabilities, etc., were all in lump figures, in accordance with the form in the Act, with no details shewing how these figures were arrived at. The accused had no knowledge that would enable him to detect any error, and had confidence in all these officers who were representing to him and the others present the correctness of these documents. He made no objection to them, and is held under these circumstances to have approved of or concurred in them negligently. There can be no doubt that the general manager and the president knew the actual financial position of the bank, and consequently the falsity of the statements which were intended to deceive and to hide the true position. This cannot be said of the auditor and chief accountant, who have been convicted on the ground of negligence only, but that does not lessen the weight the accused was entitled to attach to what they did. The assistant general manager, prior to his promotion to that office, had been manager of the Toronto office, where most of the large accounts that caused the failure of the bank were carried. He must, therefore, have had full knowledge of all the details of these accounts, and next to the general manager and president was in the best position to detect any falsity in the statement and profit and loss account that he presented to the board on the 19th June, and to the shareholders' meeting on the 29th June. If he knew they were false, he was a party to the deception; but, on the other hand, if he were innocent, and, as an experienced banker, with the special knowledge that he had of these large accounts, was deceived by the general manager and president, how could this accused, who was

not a banker at all, be held guilty of negligence because he failed, without such special knowledge, to discover the deception? The accused did have some knowledge of the Barnard account, but took steps at the instance of the general manager to get additional security and succeeded in getting a large amount of such additional security; and, though he realised that there would still be a loss, he had no reason to suppose that such loss was not taken into account in the statement, particularly as \$200,000 had at one time been written off from this account. What appears in the minutes of directors' meetings that he attended would not in itself indicate that the statements were false, but it is argued that there was enough to cause suspicion, and inquiry would have disclosed the truth. Inquiry from the general manager or the president would have disclosed nothing, because they were deliberately concealing and deceiving. Inquiry from the assistant general manager would have led to nothing because he himself was apparently deceived, as were the auditor and chief accountant and his assistant.

Having regard to the law as discussed by this Court in other of these Home Bank cases, and applying the principles laid down in *Dovey v. Cory*, [1901] A.C. 477, and *In re City Equitable Fire Insurance Co. Ltd.*, 40 Times L.R. 664, 853, I am of opinion that, assuming the falsity of the statements complained of and the approval of or concurrence in them by the accused to be established by the evidence, he cannot, under all the circumstances, be held guilty of negligence in so approving or concurring within the meaning of sec. 153(2). Having reached this conclusion, I deem it unnecessary to deal with the question, argued at great length at the trial, as to the admissibility of the minutes and books of the bank as evidence against the accused of their contents without more.

The judgment of the majority of the Court is that the conviction of the accused be set aside.

Appeal allowed.

[APPELLATE DIVISION.]

REX V. BARNARD.

Criminal Law—Director of Bank—Offences against Bank Act, sec. 153—False Statements in Annual Return to Minister of Finance—Using False Statement—Negligent Approval of or Concurrence in—Knowledge of Director—Evidence—Absence from Directors' and Shareholders' Meetings—Proxy—Duty of Director—Mens Rea—Meaning of "Negligently" in subsec. 2—Individual Responsibility of Director for Return.

On the 19th June, 1923, the annual statement (called for by sec. 54 of the Bank Act, 1913) of the affairs of the Home Bank of Canada, of

App. Div.

1925.

REX
v.

CLARENCE F.
SMITH.

Smith, J.A.

1925.

June 27.

1925.
 —
 REX
 v.
 BARNARD.

which the defendant was at that time a director, was submitted by the general manager to the board of directors, meeting in Toronto, for approval. The defendant, who lived in Montreal, was not present. This statement was submitted to the shareholders at their annual meeting held in Toronto on the 26th June, 1923; and on the 14th July, 1923, a copy thereof was sent to the Minister of Finance. The defendant was not at this meeting, but signed and sent to Toronto a proxy. The Crown charged that the return or statement was false and deceptive within the meaning of sec. 153 of the Act, and that the defendant was guilty, under clause (a) of subsec. 1, of having wilfully made it with intent to deceive, etc.; was guilty, under clause (b), of having used it with intent to deceive, etc.; and was guilty, under subsec. 2, of having negligently prepared, signed, approved, or concurred in it. The defendant was tried by a County Court Judge without a jury, and was convicted upon all three counts:—

Held (by the majority of the Court), upon appeal from the conviction. that, assuming the statement to have been false or deceptive, there was no evidence that the defendant made or took any part in the making of it, nor that he used the statement with intent to deceive or mislead any person; and his conviction under clauses (a) and (b) was quashed.

As to his conviction under subsec. 2, there was no evidence that he signed or prepared or took any part in the preparation of the statement; but it was argued that, when he received, at his place of residence, a copy of the statement, he must have known that it was false and deceptive; that it was his duty to inform the Minister that it was false and deceptive; and that his not having done so was evidence of his having approved or concurred therein:—

Held, that in a criminal prosecution the onus is upon the Crown to prove affirmatively every material circumstance which is necessary in order to establish guilt; and, it not having been shewn that the defendant read the statement or was aware of its contents, or had reason to believe that it was false, there was no duty on his part to inform the Minister that it was false; and his not having done so was not evidence of his approval or concurrence in the statement. His conviction under subsec. 2 was quashed.

Per HODGINS, J.A.:—To warrant a conviction under subsec. 2 for negligently approving or concurring, *mens rea* must be shewn.

Rex v. Brinkley (1907), 14 O.L.R. 434, 446, 447, and *Rex v. Ping Yuen* (1921), 65 D.L.R. 722, referred to.

Discussion of the meaning of "negligently."

Subsection 2, as it stands in the Bank Act of 1913, confines negligence to cases in which the director has had some cause for suspicion or reason for making inquiry or independent investigation.

If the negligence intended to be punished is want of proper antecedent attention to the duties of a director so as to gain sufficient knowledge to detect any false statement in a proposed return, the statute does not provide for or include it. Instead, it makes the offence consist in negligently performing a present, conscious act, such as signing or approving of the return. If negligence is directed to want of care or recklessness in assenting to the return, such as absence of inquiry and investigation to verify the information given, then it assumes that the right and duty exist to make a present inquiry and investigation into each item, both as to proper classification and value as an asset, and yet involves the consequence of guilt if any false or deceptive item escapes detection, because the presence of any such statement in the return is sufficient to shew that the director did not make sufficient investigation. This view of the section makes the

responsibility so onerous and extensive that it is impossible to doubt that Parliament never intended such a result.

Review of the authorities.

Dovey v. Cory, [1901] A.C. 477, *Prefontaine v. Grenier*, [1907] A.C. 101, and *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 664, 853, specially referred to.

Although the report or return under sec. 54 is to be "signed on behalf of the board," each director is not individually responsible for its contents. As the board can act by a majority or by a quorum, the making of the report does not involve or require authority from each individual director, and in a criminal case he cannot be personally held to have made or authorised the report, unless he has actually had a hand in it.

A proxy not shewn to have been voted upon was not sufficient evidence of approval of or concurrence in the statement.

Reference to *Lanier v. Rex*, [1914] A.C. 221, 24 Cox C.C. 53, as to "constructive criminal responsibility."

1925.

REX

"
BARNARD.

THE charge against C. A. Barnard, also a director of the Home Bank of Canada, contained the same three counts as the charge against Clarence F. Smith (see the case immediately preceding this), and Barnard was tried thereon before COATSWORTH, Co.C.J., in the County Court Judge's Criminal Court, without a jury, and on the 25th November, 1924, found guilty as charged on all three counts.

Written reasons were given by the learned County Court Judge as follows:—

The accused is charged in three counts: that at Toronto on the 26th day of June, 1923, being a director of the Home Bank of Canada, he did, in the directors' yearly statement: (1) make a wilfully false or deceptive statement; (2) unlawfully use a false or deceptive statement; (3) negligently sign, approve, or concur in an account containing false or deceptive statements.

Under the Bank Act, 1913, the directors must, in the statement in question, shew a clear and full account of the business of the bank for the year, and of the assets, resources, and liabilities, in a specified form, to be presented at the annual meeting of shareholders and filed with the Minister of Finance thereafter.

No evidence was offered in support of the said statement. The evidence of the Crown was quite clear that it was false and deceptive. I therefore find the statement referred to in the charge-sheet to be false and deceptive within the meaning of sec. 153 of the Bank Act.

On the 12th January, 1916, the accused, C. A. Barnard, was elected by the directors of the Home Bank to fill a vacancy on the board. At the annual meeting of shareholders in June, 1916, he was formally elected by the shareholders, and each year thereafter,

1925.
REX
v.
BARNARD.

including 1923, was re-elected by the shareholders, so that he was a director for over seven and one-half years. During this period the number of meetings of the Board held was 250. The number of meetings he attended was 29.

During five of these years the directors received compensation for their services. In this period he received for his services as director \$2,765. In the five years for which he was paid the number of meetings he attended was 13.

Between June, 1913, and June, 1923, the amount paid to the accused personally for dividends was \$12,890.37; and to him and another in trust \$34,890.37. And to his company, the Fidelity Trust Company of Canada, \$79,885. These four items make a total of \$129,626.37.

The evidence discloses clearly how these sums and similar sums to other persons were paid and that they were not paid out of any realised profits. During the last seven years, or from 1916 to 1923, unpaid interest was capitalised to the extent of \$2,820,-651.91, and mostly carried into profits, and has never been paid. In 1923 alone, the amount was \$891,724.17, over three times the amount stated as profits in the statement in question, that is \$232,718.01. The cash to carry on and to pay dividends and directors' fees, etc., was obtained from the public deposits, which in 1923 increased to \$22,151,769.99 from \$10,133,733.54 in 1914, giving cash \$12,018,036.45 of the people's money to work on and squander in the interest of non-paying debtors and to bolster up a bankrupt bank.

The accused first objects to the jurisdiction of the Court, on the ground that he is a resident of Montreal, and apparently the Court is asked to assume that on the date of the statement in question, the 26th June, 1923, he was in Montreal, and not in Toronto. There is no evidence as to where he was on that date. As the offence is charged in Toronto, the onus is on the Crown to establish it; but, in the view I take, that does not necessarily require personal presence; consequently, his personal presence or absence on the date mentioned is, in my opinion, not material.

It is a directors' statement mentioned in the charge, and therefore a statement which each director was on the said date presenting to the shareholders in Toronto as his account of the assets, resources, and liabilities of the bank.

The accused was present at the annual meeting of 1922, whereat a similar directors' statement was presented, also false and deceptive.

It was his duty to be present at the annual meeting in question.

He endeavours to make his absence a virtue. The statement had been written out for the directors by the chief accountant, who, as secretary of the bank, read it at the annual meeting. What was done was exactly what the accused must be taken to have authorised to be done. He and the other directors had the statement prepared as their own and presented as such to the shareholders. The secretary acted for him and all directors in reading the statement at the meeting. It was at that annual meeting presented by the accused and other directors as their annual statement. As a matter of fact the accused had given a proxy, exhibit No. 6, authorising H. J. Daly, R. P. Gough, and S. C. Wood to vote for him at the shareholders' meeting. No director took part in the reading of the statement. The real offence was in causing such statement to be prepared and given out as the directors' statement and a clear and full account of the business of the bank for the year and of the assets, resources, and liabilities thereof, and presented by the directors to the shareholders.

Moreover, the chief accountant testified that immediately after the meeting he mailed a copy of the statement with a cheque for \$565, a year's director's fees, to the accused, and a copy of his letter and the reply of the accused are in evidence as an exhibit. Also the mailing clerk testified that he had mailed the accused a copy of the statement and minutes as finally printed. There is no denial of the receipt of these copies, but every indication of the acquiescence, approval, and concurrence of the accused in them and the statements therein contained.

It is rather significant that, instead of standing by the directors' statement and asserting the correctness of it, the accused falls back on his technical defences.

There is, however, one broad ground of defence urged for the accused, which, if sustained, has real merit in it. He asserts that during his connection with the bank as director he did everything that a director could do in the interest of the shareholders to prevent the catastrophe which was finally brought about. His conception of his duty was very narrow, as he considered it performed when he relied upon the bank's officials and saw nothing in their conduct or the books of the bank to raise any suspicion that everything was not as it appears on the face of the statement, which, though a directors' statement, was in fact written out by the officials. The accused asserts that it was impossible for him to go back far enough to ascertain the true condition of the bank's affairs.

Setting aside for a time the obvious reply that he should not present a statement that he had not fully analysed and considered

1925.
REX
v.
BARNARD.

1925.
REX
v.
BARNARD.

and understood, one is impressed that, if the statement was on his part really an honest one, such a defence is entitled to the most careful consideration.

However, before any conclusion is arrived at, it is essential to trace the history of the connection of the accused with the bank, to determine what were his means of knowledge and his actual knowledge of conditions which may deprive him of this defence—that the statement is honest even if mistaken and wrong.

It will not be necessary to go into the many details so voluminously set out in the evidence. Generally speaking, the ruin of the bank was brought about by tying up cash assets in bad debts and loans and unrealisable securities, so that, even finally, the deposits did not come in fast enough to keep it going. The semblance of profits was preserved chiefly by carrying unpaid interest to profits. This interest, as already stated, amounted in the aggregate to over \$2,000,000. There were other matters also calculated as profits, such as alleged profit on the sale of properties, etc.

The accused first comes under our observation almost in the guise of a benefactor of the bank. When things were looking unfavourable in 1916, and three very important and large accounts were outstanding and no immediate prospect of payment, he and Mr. Haney went together to the Minister of Finance, and there were indications that he expected to assist in putting the bank in a perfectly safe position.

This rôle did not continue very long, because we next find him as a borrower, and this continues from year to year and seems to come to a climax in 1919, when we have the disastrous personal transactions of the Davie Company cheques, deposited in his account, as a total loss to the bank of \$352,000; the Anderson draft, loss to the bank of \$165,000; and his own overdraft of \$105,612.86: in all \$622,612.86. And the unloading on the bank of two unfortunate steamers, the "Vaudreuil" and "Paipoonge," which, if the expression may be used, were hung like millstones on the neck of the bank and must have greatly assisted in submerging the institution. So far from being any security, these boats actually cost the bank \$375,969.82 for reconstruction, repairs, and running expenses, interest, and losses, and the liquidator has been able to realise only \$39,000 on the sale of both of them.

Though the accused neglected the directors' meetings, he was actively mixed up in the business of the bank throughout, and did not neglect any opportunity of using its funds for his own purposes and those of his companies.

Meantime he must have known that the enormous debts con-

cerning which he interceded with the Minister of Finance had, instead of being paid or reduced, piled up higher and higher until all control was lost. This knowledge made more emphatic his duty to look after the interests of the shareholders, who elected him.

The juggling which gave the Frost account of \$2,668,544.16 credit on the 31st January, 1920, for a reduction of \$776,000, did not mean any payment, but only created a new debtor, with another cash advance of \$190,000 to the Western Canada Pulp and Paper Company, and in an incredibly short time this offshoot from the Frost debt grew to another debt of over \$1,250,000. Then apparently another juggling became necessary, and two new companies appear. The Port McNeill and the Howe Sound Companies. The debt over-night of the 30th-31st May, 1923, swelled to \$1,975,000, of which the Port McNeill Company took \$1,000,000 and the Howe Sound Company \$975,000, and they are still outstanding and unpaid.

It is incredible that the accused was ignorant of these financial gyrations. They were done under the watchful care of directors who were interested in all or nearly all of these companies. It was these and other like transactions by the directors, and not anything which was done by the officials, which ruined the bank.

The accused was deeply involved in all the wrecking transactions, either by direct participation or actual knowledge, and cannot now plead ignorance.

His visit to the Minister in 1916 shewed a knowledge of the large bad debts of the bank, which never improved. He himself added another to them which may have been the last straw, because on the 31st May, 1923, his debts and the boat losses assumed by the British Dominion Holding and Investment Corporation Limited amounted to \$1,042,882.06.

I might, as already mentioned, have gone more into the details about the dealings of the accused with, by, and through the bank, but they are fully developed in the evidence taken.

In conclusion, I find the accused guilty as charged on all three counts.

The defendant appealed from the conviction.

April 29 and 30 and May 1. The appeal was heard by M^CLOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

R. S. Robertson, K.C., for the appellant. The three offences set out in the three counts are charged as having all been committed in Toronto on the 26th June, 1923, and they all refer to the same statement, that is, the statement of the directors to the

1925.

REX

v.

BARNARD.

App. Div.

1925.

RFX
v.

BARNARD.

shareholders of the 31st May, 1923. The appellant was not at the annual meeting of the 26th June, 1923, nor at the directors' meeting whereat the report was dealt with. There is a fundamental error on the part of the learned County Court Judge: he considers that the statement or report upon which the conviction is based may be made by a director although he has personally had nothing to do with the statement. The learned Judge puts it broadly—whether the appellant had anything to do with it or not, it is a directors' statement and consequently the appellant's. That is entirely erroneous: the statement is a statement of the board of directors—the duty to make it is a duty imposed upon the board. Section 54 of the Bank Act plainly contemplates only the one statement—there is to be annually one statement. There is no provision in the Act for any individual statement by a director. The section says that the statement is to be signed by the general manager or other principal officer of the bank, and is also to be signed on behalf of the board—that is, the president or vice-president or two directors are to sign the statement on behalf of the board. That plainly means that the statement is the board's statement. If an individual director did not like the statement, he could not send one of his own in compliance with this section. *In re Denham & Co.* (1883), 25 Ch.D. 752, 765, is an authority upon a kindred matter. The appellant was absent, and an absent director is not deemed to have authorised any one to act for him. If the appellant could be assumed to have given any authority at all, it would be only authority to make such a statement as sec. 54 requires—that is, a true and proper statement. The statement was in fact prepared by the chief accountant of the bank. Whatever may be the proper interpretation of sec. 54—sec. 153, under which these charges are made, requires something more than and something essentially different from a constructive presence or a constructive making or concurrence—sec. 153 requires wilfulness or intent or negligence. The constructive presence at a meeting that might be imputed to a person could not be foundation for a conviction for having wilfully done a thing at that meeting; and there could not be an intent to defraud or mislead on the part of a man who was not there at all and had nothing to do with the statement. There is no evidence that the appellant "used" the statement—no evidence that he did anything with it, unless receiving it in Montreal, where he lived, was doing something. Nor can he be deemed to have negligently concurred in it if he was only constructively present when it was presented. He must have done something to indicate that he concurred. The learned County Court Judge misconstrued sec. 54 and misapplied sec. 153. Approval and con-

currence mean something more than acquiescence: *Rex v. Hendrie* (1905), 11 O.L.R. 202; *Rex v. Dumont* (1921), 49 O.L.R. 222, 230; *Rex v. Lomas* (1913), 23 Cox C.C. 765. To shew approval the Crown relies upon a letter from the appellant of the 29th June, 1923, in which he acknowledges the receipt from the bank of a letter written on the 27th June enclosing a cheque in his favour for \$565 "directors' fees for the fiscal year just closed." The letter of the 27th June is not produced, but what purports to be a copy of it is produced by the Crown, and it states that there is also enclosed in the letter a copy of the financial statement as submitted to the shareholders. But it is not established that any statement was in fact sent. It is also stated in the copy of the letter that the published report of the annual meeting "will be forwarded to you as soon as received from the printers." There was no evidence that the report was sent to the appellant. The appellant's letter merely acknowledges the receipt of the cheque, and thanks the sender. The appellant signed a proxy delegating to the president and two other directors his power to vote at the annual meeting. There was no evidence that the proxy was used to vote approval of the report or in any way. As against the appellant, the minutes, with the possible exception of the minutes of the two directors' meetings which he attended, are not evidence. The appellant could not properly be convicted of a crime committed by proxy, unless it were shewn that the proxy was given for the particular purpose of doing the very act which constituted the crime. The minutes of the annual meeting are not evidence against the appellant. [HODGINS, J.A., referred to *Rex v. Canadian Allis-Chalmers Ltd.* (1923), 54 O.L.R. 38.] Even if the appellant were in any way the cause of the bank's failure, he took no part in this report, was not present at the meeting, and cannot be convicted of concurrence in it. As to the meaning of "concur" and "approve," reference may be made to *Dillon v. Scofield* (1881), 9 N.W. Repr. 554; *Eubanks v. The State* (1911), 114 Pac. Repr. 748; *In re Lands Allotment Co.*, [1894] 1 Ch. 616, 642, 643; *Bank of the United States v. Dandridge* (1827), 12 Wheat. 64; *New York and New England Railroad Co. v. City of Waterbury* (1886), 55 Conn. 19. In a criminal case a fact must be proved beyond a reasonable doubt. There is no proper evidence that the statement was in the letter of the 27th June, nor indeed that the letter itself was sent. The letter is not produced—nothing but a copy kept in the bank is produced. The appellant acknowledges the receipt of the cheque, which may have been in another letter. If he did get the statement, and said and did nothing on receipt of it, it is not to be assumed that he concurred or approved. It called for no action on his part. He knew

App. Div.

1925.

 REX
v.

BARNARD.

App. Div.
1925.
REX
v.
BARNARD.

that the statement had already been presented to the meeting and that it would be printed and sent out to the shareholders and to the Minister, as imperatively required by the statute. There was no duty, under the Act, that he was called upon to perform. If he looked at the statement and thought that there was something wrong with it, all he could do would be to wait until he was at a directors' meeting and had a proper chance to bring his objection before the other directors. If he was called upon to do anything at all, he first of all had to be given some time in which to do it, and what that time should be would depend upon a number of circumstances. There is no evidence that he did not write to the general manager or to the Minister. If the Crown bases its argument on silent acquiescence—the omission to do something—the Crown must prove some omission. There is no proof. He wrote to the chief accountant acknowledging the cheque and said nothing. That surely is not concurring. The situation as to concurrence or none must be looked at from the point of view of the individual director, having regard to all his circumstances—where he was, what he knew, within what time he should reach his conclusions, etc. Even assuming that the argument just advanced should not prevail, assuming that concurrence may be a mere mental operation, or may be taken for granted because it is not known that he did anything, and assuming that the receipt by the appellant of the statement in Montreal is proved, the Crown has no case. What is charged is a concurrence at a stated place and time, Toronto, the 26th June—not any other place or time. That is the only charge made. An error in date or place is a matter of substance in a criminal prosecution. There cannot be an amendment without the consent of the accused. He consents to be tried by the County Court Judge upon the charge formulated, and there can be no amendment that will change the charge without his consent: sec. 834 of the Criminal Code. [MULOCK, C.J.O., referred to sec. 839.] Under sec. 577, if the charge had specified Montreal as the place, the accused could not have been tried in Ontario. [HODGINS, J.A.:—That must depend upon whether the approval or consent must be in some active form—whether acquiescence is shewn as a fact, either in Toronto or Montreal.] The Crown makes no case of concurring or approving negligently except what is based upon the sending of the statement to Montreal; and, as to that, whether it is a mere mental operation or something active, it can only be at Montreal, where the statement was sent, where the appellant lives, and where he presumably was. The Crown has not proved that he was anywhere else. There was no evidence here to bring the

case within the authority of *Rex v. Oliphant*, [1905] 2 K.B. 67. [MAGEE, J.A., referred to *Regina v. Sternaman* (1898), 29 O.R. 35.] The appellant here adopts whatever is relevant in the arguments of the appeals in the other cases against directors of this bank; but two or three things should have special attention because they relate particularly to this appellant. Living in Montreal, he was not frequently in attendance at meetings and is not chargeable with the knowledge which constant attendance might have given him. He was not familiar with all the affairs of the bank. The Crown, however, endeavoured to bring home to him some special knowledge, at a very early date, of three important accounts. Some letters written in 1916 in the course of correspondence between the general manager and a solicitor in Winnipeg representing certain Western directors, and a memorandum of the then Minister of Finance, relating to these three accounts, were put in, but they are not evidence against the appellant. The Minister was called as a witness, but he did not really verify the memorandum—he did not pledge his oath to the truth of the things in it. He said that he had no doubt that the document was true; but that is not enough: *Kensington v. Inglis* (1807), 8 East 273, 289; *Payne v. Ibbotson* (1858), 27 L.J. Ex. 341. [HODGINS, J.A., referred to *Fleming v. Toronto Railway Co.* (1911), 25 O.L.R. 317.] The document is not to tell the story—the witness must tell the story. The Crown, having introduced this memorandum, which related to a conversation which the Minister had with the appellant and another person about the affairs of the bank, argued that it must be assumed that the Minister shewed the appellant the letters above referred to (which were attached to the memorandum) or told him what was in the letters. The learned County Court Judge, in his reasons for judgment, makes special reference to this as indicating knowledge possessed from an early date by the appellant of these three accounts. But the inference is too far-fetched. [Discussion as to the three accounts and the appellant's connection with them.] Even if the appellant knew that there were heavy losses, looking at the statement which was sent to him at Montreal, he could not tell from it whether those losses had been left out and what the situation was with regard to the rest. In any event, the appellant had nothing to do with the getting out of the statement.

McGregor Young, K.C., for the Crown. There is abundant evidence to support the conclusion of the trial Judge that the statement of the 31st May, 1923, was, as far as the appellant was concerned, a wilfully false statement. There was a special duty upon

App. Div.

1925.

REX
v.

BARNARD.

App. Div.
 1925.
 Rex
 v.
 BARNARD.

the appellant from his special knowledge of all the accounts which combined to wreck the bank. He was convicted of making a wilfully false statement; and, upon the facts fairly to be regarded as established by the evidence, he did make a false statement. [Discussion of the evidence.] There is no escape from the inference that when in 1916 the appellant went to see the Minister of Finance he knew everything about these accounts and was taking an active and prominent part with reference to them. The Minister's memorandum is clearly admissible, under the authority of *Fleming v. Toronto Railway Co.*, 25 O.L.R. 317, 323. There is evidence which supports the finding of the trial Judge that the statement of the 31st May was wilfully false and that the appellant made it and also approved of and concurred in it. With the special knowledge which he had, he brought himself, when he abstained from inquiring, within the provisions of sec. 69 of the Criminal Code—the aiding and abetting clause. He was doing or omitting to do something with respect to that statement. When he got the notice of the annual meeting, he knew that a meeting was to be held at which a statement was to be submitted to the shareholders, under sec. 54 of the Bank Act; he knew that the statement was to be sent to the Minister, that it would result in the unlawful payment of dividends and in keeping the bank open when it was insolvent. These were unlawful acts within the language of sec. 69 of the Criminal Code. The appellant was indicted under sec. 153 of the Bank Act, and that brings him under all the provisions of the Criminal Code: Interpretation Act, R.S.C. 1906, ch. 1, sec. 28. He stayed away from the meeting, and his act of abstaining, having the knowledge he had, brings him within sec. 69. A person who has aided and abetted the commission of an offence may be convicted upon an information which charges him with having committed the offence as the principal offender: *DuCros v. Lambourne*, [1907] 1 K.B. 40, 46. The accused can be found guilty of “making” if he comes within sec. 69. That does not preclude the Crown from saying that he has actively concurred so as to come within the other clauses of sec. 153. There was the proxy and there was the receipt of a copy of the financial statement. A bank is in a different position from that of an ordinary trading company in that it represents that it carries on a business that is sound: *Rex v. Parker and Bulleel* (1916), 25 Cox C.C. 146. Until the 1913 revision of the Bank Act, the word “make” was held to include, in the case of a director, his concurrence or approval. According to the dictionary definitions, “approval” is primarily subsequent and “concurrence” is either antecedent or current in point of

time. As evidencing concurrence, we have the sending of the proxy, which is practically a blank order to some one to take such action at the meeting as he should please, and that would bind the appellant, with all the knowledge he had. Then, having sent the proxy, he sees, the next day, what was done, because the financial statement is sent to him. If the appellant knew that this bank could not pay dividends, when he got a financial statement that shewed sums available for dividends, his duty was to take some action. He had such knowledge as made it incumbent upon him to make inquiries to satisfy himself that the statement that the bank was in a position to pay dividends was true; if he refrains from that, he takes the consequences under sec. 153. The cases on the meaning of "wilful" and "wilfully" are collected in Stroud's Judicial Dictionary, *sub verbis*. The most apposite are: *Regina v. Senior*, [1899] 1 Q.B. 283; *In re Young and Harston's Contract* (1885), 31 Ch. D. 168, 174; *In re Mayor of London and Tubbs' Contract*, [1894] 2 Ch. 524, 536; *Lewis v. Great Western Railway Co.* (1877), 3 Q.B.D. 195, adopted in *Johnson v. Allen* (1895), 26 O.R. 550, 553. Section 509 of the Criminal Code defines "wilful" for another purpose. As to negligence, by sec. 153(2) it is now a criminal offence to concur negligently, and that imposes a special duty upon a director to take special care to see that a false statement does not get out. There is now no distinction between criminal and civil negligence, as far as Canada is concerned: *McCarthy v. The King* (1921), 62 Can. S.C.R. 40. Concurrence and approval being established, and the evidence of the appellant's knowledge being accepted, there is not much doubt as to the negligence. As to what constitutes negligence on the part of a director, I rely on the argument addressed to the Court on behalf of the Crown in the *Smith* case, *ante*, and the cases cited. [Examination of the authorities cited for the appellant in the present case.] As to jurisdiction, sec. 888 of the Criminal Code speaks of an offence committed entirely in another Province. The offence of the appellant was not entirely in Montreal. The statement reached the Minister in Ontario, and the proxy was sent to Toronto. The full fruition of everything that the appellant could have done in the way of concurrence in Montreal is in Toronto—in Ontario. And, without regard to the proxy, if he concurred in or approved of an act committed in Ontario, the uttering of the false statement, the case is within the Ontario jurisdiction. The wrongful act is consummated in Ontario. Reference to *Rex v. Munton* (1793), cited in 6 East at p. 590; *Regina v. Ellis*, [1899] 1 Q.B. 230; Archbold's Criminal Pleading, 26th ed. (1922), p. 38; *Rex v. Oliphant*, [1905] 2 K.B.

App. Div.

1925.

REX

v.

BARNARD.

App. Div.

1925.

REX
v.

BARNARD.

61, 21 Cox C.C. 192; *Regina v. Gillespie* (1898), 2 Can. Crim. Cas. 309; *Rex v. Bachrack* (1913), 28 O.L.R. 32. [References to the evidence in regard to accounts of which the appellant had knowledge.]

D. L. McCarthy, K.C., on the same side, referred to the evidence in regard to some of the accounts with which the appellant had to do, and said that all the directors were, from the standpoint of the Crown, engaged in an unlawful endeavour to keep the doors of the bank open while, as a matter of fact, it was insolvent. That was a matter for which they were jointly responsible. As long as the doors were open, there was an advertisement to the public that the bank was solvent and an invitation to make deposits. The appellant is responsible for the directors' report read at the annual meeting. The origin of that report is not shewn. It was handed apparently to the assistant general manager and he read it to the shareholders. As one of the directors, the appellant made that report—it is the report required by sec. 54 of the Bank Act. In regard to what is called "the general statement," which is referred to as a statement of the result of the business of the bank for the year ending on the 31st May, 1923, the proper inference to be drawn is that the appellant was the maker of it also. Both were false documents. What is said in *Dovey v. Cory*, [1901] A.C. 477, would not apply to cases in which the directors had kept the control of certain matters entirely in their own hands—such as the profits, the dividends, the head-office investments, and loans over \$5,000. Further reference was made to *Rex v. Oliphant*, *supra*, and *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 664, 853.

J. C. McRuer was also of counsel for the Crown, but did not address the Court.

Robertson, K.C., in reply. The directors' report was never read at a meeting at which the appellant was present. It is suggested that a letter was sent by the chief accountant of the bank to the appellant enclosing a copy of the statement. There is no evidence that the original of the copy produced ever reached the appellant. That way of attempting to prove such a letter is not proper: Taylor on Evidence, 11th ed., p. 962, para. 1409; Phipson on Evidence, 5th ed., p. 467; *Alcock v. Royal Exchange Assurance Co.* (1849), 13 Q.B. 292. The evidence shews the manner in which the minutes were compiled and who wrote them, and how far they are removed from coming directly from the meeting. The minutes are signed by the general manager, but not contemporaneously. There is no evidence to shew that the minutes contain a correct report of what

occurred at the meeting. If the minutes were subsequently confirmed, that does not make them evidence. The charge against the appellant is not one for omitting to do something—it is for doing something. [MAGEE, J.A.:—It is concurring by omitting to do a duty in Ontario.] It was not necessarily something to be done in Ontario. In any case, there is no evidence of this omission, and there must be if the omission is the crime. The accused is not called upon to prove anything until the Crown has made out the offence. Section 54 of the Bank Act, the section requiring that a statement shall be submitted by the outgoing directors, says that the statement shall be signed by an officer of the bank who is not a director at all and then by the president or vice-president on behalf of the board. There can be only one statement, according to the wording of the section, and substantially it is a corporate act.

App. Div.

1925.

REX
v.

BARNARD.

June 27. The judgment of the majority of the Court was (by direction of the Chief Justice) read by HODGINS, J.A.:—The accused was convicted on the 25th November, 1924, by Coatsworth, County Court Judge, sitting without a jury in the County Court Judge's Criminal Court, of three offences, which his Honour thus describes:—

“That at Toronto on the 26th day of June, 1923, being a director of the Home Bank of Canada, he did, in the directors' yearly statement: (1) make a wilfully false or deceptive statement; (2) unlawfully use a false or deceptive statement; (3) negligently sign, approve, or concur in an account containing false or deceptive statements.”

He was found guilty on all three counts.

His Honour, speaking of the report referred to as the directors' yearly statement, which is required by sec. 54 of the Bank Act of 1913 to be made by them, said:—

“No evidence was offered in support of the said statement. The evidence of the Crown was quite clear that it was false and deceptive. I therefore find the statement referred to in the charge-sheet to be false and deceptive within the meaning of sec. 153 of the Bank Act.”

It is to be regretted that the learned Judge did not specify what statements in this detailed, and, in its preparation, complicated, return, were false and deceptive. This omission has resulted in this Court having to listen, in all five cases before it, to the intricate character and particulars of the history of numerous large and lengthy transactions. Much of the time occupied thereby would

App. Div.
1925.

REX
v.
BARNARD.

Hodgins,
J.A.

have been saved and much expense avoided had the Crown singled out three or four of these matters on which to found the charges made, and secured a definite finding that they were falsely stated in the return and in what the falsity consisted. As it is, this Court does not know upon what particular false and deceptive statement or statements the finding of the trial Judge was founded, and gains no idea as to what was the connection between them and his conclusion of negligence. This, in my view, is a most important omission. His judgment then proceeds:—

“The accused first objects to the jurisdiction of the Court, on the ground that he is a resident of Montreal, and apparently the Court is asked to assume that on the date of the statement in question, the 26th June, 1923, he was in Montreal and not in Toronto. There is no evidence as to where he was on that date. As the offence is charged in Toronto, the onus is on the Crown to establish it; but, in the view I take, that does not necessarily require personal presence; consequently, his personal presence or absence on the date mentioned is, in my opinion, not material.”

“It was his duty to be present at the annual meeting in question. He endeavours to make his absence a virtue. The statement had been written out for the directors by the chief accountant, who, as secretary of the bank, read it at the annual meeting. What was done was exactly what the accused must be taken to have authorised to be done. He and the other directors had the statement prepared as their own and presented as such to the shareholders. The secretary acted for him and all directors in reading the statement at the meeting. It was at the annual meeting presented by the accused and other directors as their annual statement. As a matter of fact the accused had given a proxy, exhibit No. 6, authorising H. J. Daly, R. P. Gough, and S. C. Wood to vote for him at the shareholders’ meeting. No director took part in the reading of the statement. The real offence was in causing such statement to be prepared and given out as the directors’ statement and a clear and full account of the business of the bank for the year and of the assets, resources, and liabilities thereof, and presented by the directors to the shareholders.

“Moreover, the chief accountant testifies that immediately after the meeting he mailed a copy of the statement with a cheque for \$565, a year’s director’s fees, to the accused, and a copy of his letter and the reply of the accused are in evidence as an exhibit. Also the mailing clerk testified that he had mailed the accused a copy of the statement and minutes as finally printed. There is no denial of the receipt of these copies, but every indication of the

acquiescence, approval, and concurrence of the accused in them and the statement therein contained."

It will be seen from the foregoing that the view of the learned trial Judge is that the director's actual presence when the return containing the false statements was made up and presented was not necessary, but that, being a director, he must be deemed constructively to have been there when the statement was being prepared and presented and to have thus authorised all that was done, including the insertion of the false and deceptive items, and that, as to approval and concurrence, these are to be inferred from the receipt by him, no matter where he was then, of the financial statement and later the same statement with the directors' report in printed book form. These assumptions are the foundation for finding the accused guilty of making and using a false statement and also that he approved and concurred in it.

At the time of the making of the annual statement referred to, the accused was a director of the Home Bank. On the 19th June, 1923, the annual statement of the affairs of the bank as called for by sec. 54 of the Bank Act was submitted by the general manager to the board to be approved of. This statement was submitted to the shareholders at their annual meeting for the election of directors held on the 26th June, 1923, and on the 14th July, 1923, a copy thereof was sent to the Minister of Finance. The Crown charges that this statement was false and deceptive within the meaning of sec. 153, and that the accused was guilty, under clause (a) of subsec. 1, of having wilfully made it; was guilty, under clause (b) of subsec. 1, of having used it with intent to deceive, etc.; and was guilty, under subsec. 2, of having negligently prepared, signed, approved, or concurred in it.

Section 153 of the Act of 1913 is as follows:—

"153. (a) The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank, or (b) the using of any false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank with intent to deceive or mislead any person, is an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding five years.

"2. Every president, vice-president, director, auditor, general manager or other officer of the bank or trustee who negligently prepares, signs, approves or concurs in any account, statement, return, report or document respecting the affairs of the bank con-

App. Div.

1925.

REX

v.

BARNARD.

Hodgins,

J.A.

App. Div.

1925.

REX

v.

BARNARD.

Hodgins,
J.A.

taining any false or deceptive statement shall be guilty of an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding three years."

Even if the statement was false or deceptive, the accused cannot be held guilty of the offence mentioned in clause (a) unless he was a party to the making of it, nor could he be held guilty of the offence mentioned in clause (b) of subsec. 1, unless he used such statement with intent, etc.; nor of the offence mentioned in subsec. 2, unless he prepared, signed, approved, or concurred in it.

There is no evidence that the accused made or took any part in the making of the statement. He was not at the board meeting when it was adopted, but in Montreal, in the Province of Quebec, where he resides. I, therefore, think the Crown has failed to prove that he made the statement in question, and therefore his conviction under clause (a) is bad in law, and must be quashed.

As to his conviction under clause (b) of subsec. 1, it is not shewn that he used the statement with intent to deceive or mislead any person. Therefore, this conviction is bad in law and must be quashed.

As to his conviction under subsec. 2, there is no evidence that the accused signed or prepared or took any part in the preparation of the statement. Therefore, he cannot be convicted of preparing or signing. It was argued that when he received in Montreal a copy of the statement he was aware that a copy of it, if it had not already been sent, would be sent to the Minister of Finance, as required by subsec. 5 of sec. 54 of the Bank Act; that he must have known that the statement was false and deceptive; and that, therefore, it was his duty to inform the Minister that it was false and deceptive; and that his not having done so was evidence of his having approved or concurred therein.

This is a criminal prosecution, and the onus is upon the Crown to prove affirmatively every material circumstance which is necessary in order to establish guilt. It was not shewn that the accused read the statement or was aware of its contents, or had reason to believe that it was false; and, therefore, not only was there no duty on his part to inform the Minister that it was false, but his doing so would have been unwarrantable, and his not having done so is not evidence of his approval or concurrence in the statement.

For these reasons, the majority of the Court are of opinion that the conviction under subsec. 2 is bad in law and must be quashed.

App. Div.

1925.

REX

v.

BARNARD.

Hodgins,

J.A.

An endeavour was made on the part of the Crown to attribute negligence to the accused by reason of his suggested neglect of duty while a director, and while acting as such in Ontario. That argument deserves some consideration, and I have no objection to giving my opinion thereon.

The statute, sec. 153, deals, in subsec. 1, with the wilful making or using and need not be further considered. Subsection 2, however, creates an offence which can only be committed in relation to a return, etc., containing any false or deceptive statement. That offence is, apart from signing or preparing, which the accused did not do, the approving of it or concurring in it, and it is essential that such approval or concurrence be shewn to have been given "negligently."

This brings the offence within the category which requires *mens rea*, otherwise intent or volition, to be proved.

I agree with Maclaren, J.A., in what he quotes, and what he says, in the following passages from his judgment in *Rex v. Brinkley* (1907), 14 O.L.R. 434, at pp. 446, 447:—

"In *Rex v. Woodfall* (1770), 5 Burr. 2661, at p. 2667, Lord Mansfield says: 'Where an act in itself indifferent, if done with a particular intent, becomes criminal, then the intent must be proved and found; but when the act in itself is unlawful, the proof of justification or excuse lies on the defendant and on failure thereof, the law implies a criminal intent.'

"In many statutes where the former class of offence is created the intent is indicated by the use of such words as 'maliciously,' 'fraudulently,' 'wilfully,' 'negligently,' or 'knowingly.' We have an illustration of this in the very section of the Code under consideration, where it is made an ingredient of the offence of bigamy in case of the second marriage taking place abroad that the accused 'leaves Canada with intent to go through such form of marriage.'"

In *Rex v. Ping Yuen* (1921), 65 D.L.R. 722, Mr. Justice Turgeon sums up the law on this subject in a way which entirely accords with my own view. He says (p. 731):—

"The well-known rule of *mens rea* applies to infractions of all penal statutes (whether the subject-matter of the statute lies, in Canada, within the jurisdiction of the Dominion Parliament or of the Provincial Legislatures), unless the statute itself expressly or by necessary implication excludes its application, and provides that the mere doing of the act shall call forth the penalty, regardless of the state of mind of the accused."

App. Div.

1925.

REX

v.

BARNARD.

Hodgins

J.A.

Section 153, under which the indictment was preferred, is not easy to construe. It has already been set out in full.

What constitutes the offence which sec. 153 is intended to punish? If the falsity of any item or statement in the statement or return is known to a director, who wilfully makes it or includes it therein, then he comes within subsec. 1. He is wilful and not merely negligent. "He certainly could not be acquitted of moral obliquity if party to a fraudulent statement:" *per* Lord Halsbury in *Dovey v. Cory*, [1901] A.C. 477, 482.

If he does not know of the falsity, then what is the significance of "negligently" and to what does it refer? A director may "sign, prepare, approve or concur." Each of these involves some conscious act of the mind. Is negligence referable to the time when these conscious acts are performed, namely at the signing, concurring, etc., or does it relate to the want of antecedent care and diligence in the performance of the duties of a director which would ensure preparedness and knowledge for dealing adequately with the return and each item in its contents? The latter view, which was very strongly urged upon us, does not seem tenable under the wording of the subsection, or reasonable from a physical or business point of view, whatever may have been the intention of Parliament when it used the word "negligently," and for this reason—subsec. 2 contemplates (1) the preparation of a detailed statement and (2) the signing of, or the approving and concurring in, one already prepared. The negligence indicated is, therefore, either in the preparation and compilation of the return in which false statements appear, or negligence in the appending of the signature to it, or in approval or concurrence, which must be signified in some conscious way. That is how the subsection is expressed. If it was intended to make criminal the negligent carrying out of the duties of a director prescribed either by statute or by-law, whereby his signature or approval would be deprived of any real value, and become, in fact, a useless form, the subsection would have been worded very differently. The neglect would not then be attributable only to the final act of signature or approval, but would have in some way comprehended the absence of antecedent care and diligence such as would have equipped a director to detect falsities, and would have provided for reckless disregard and inattention to his duties. It would probably, and indeed properly, have dealt with the report as a whole and not merely with individual false items in a return, requiring the aggregate of the items or the return itself to give some clear business view of the solvency, true classification and valuation of assets of the

bank. This aspect has been dealt with in the amendment passed in 1923. See sec. 153 of 3 & 4 Geo. V. ch. 32. But this is not covered in the Act of 1913, upon which this prosecution is based, and it is ignored in the words chosen. They are not negative but positive, not past but present—*signature, preparation, approval, concurrence*. These words and the idea they represent cover both the diligent and the indifferent director, either of whom may refuse to sign or concur till he then satisfies himself by diligent inquiry and verification that no false statement has crept in.

App. Div.
1925.
REX
v.
BARNARD.
Hodgins,
J.A.

If he does not so inquire, then, no matter how careful the diligent director may have been in informing himself as to the affairs of the bank, a false statement or deceptive description may have been inserted by some officer of the bank, which could only be detected by immediate investigation. In this case we have no clear statement as to the particular false items about which, it is said, the accused should have known. Instead we are asked to deduce, from the mass of figures and transactions, the conclusion, come to by an accountant after prolonged study, that their description or classification in the statement is false and deceptive. A director must, if the view presented to us by the Crown is correct, accept responsibility for negligent approval or concurrence unless he similarly studies and detects them before agreeing to the return being made. This is to put upon him an impossible burden, because for each director to investigate each item of the bank's business, from the proper count of the specie, etc., to the proper classification of each item and its market value, would need much expert knowledge and a length of time and labour that no legislative body would ever expect from or impose upon a director.

The closest attention to the bank's business during many years would fail as a defence if in any statement a false or deceptive item appeared which was not detected.

The effort of the Crown to meet this difficulty was to urge that only in such matters as the directors could not delegate, were they bound to inquire into and satisfy themselves, and that if a number of large items were shewn to be wrong and deceptive, that was in itself evidence that no care had been bestowed. But these only avoid and do not answer the difficulty. If only one wrongful item was found outside the suggested limit, what difference would it make if in the limited class of matters referred to there were no errors?

The conclusion I have come to is that subsec. 2, as it stands, while devised to satisfy the ear, is really useless for any practical

App. Div.
1925.

REX
v.

BARNARD.

Hodgins,
J.A.

purpose, unless it is confined within the limits set out in the cases referred to on the argument, which limit negligence to matters in regard to which the director has had some cause for suspicion or reason for making inquiry or independent investigation.

In the case of *Dovey v. Cory*, to which I have referred, Lord Halsbury, L.C., discusses the argument put forward here. He details the methods of the banking business, which, as in the present case, comprised a head-office, a general manager, branches which sent up a weekly statement of assets, liabilities, advances, and overdrafts, and a list of its securities, also quarterly returns. These weekly statements and quarterly returns were, as here, in the board-room for reference in case of need, but unless attention was called to them the directors did not examine them. The inspectors reported to the general manager, and the accounts of the head-office were audited by professional accountants, as well as the certified returns from the branch managers.

It must also be borne in mind that the books of the Home Bank were well kept, and, if examined, would be found to agree with the statements extracted and compiled by the officers of the bank for presentation to the general manager.

The conditions which were shewn in the *Cory* case are very similar to those appearing in the case of the Home Bank, and it is with them before him that Lord Halsbury speaks when he says ([1901] A.C. at pp. 485, 486):—

“The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a net work of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made

criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest.”

These remarks, I think, exactly express the difficulty of establishing such a standard as was, according to the argument before us, set up by our Bank Act of 1913, in relation to a director's responsibility. It was, however, suggested that a distinction existed in two respects between that case and the present, in that any charge of moral obliquity was abandoned in the House of Lords, and that with regard to dividends Mr. Cory did inquire. As to the first, the Court of Appeal below acquitted him of moral obliquity on a consideration of the facts, and that finding was not appealed from nor controverted. So the abandonment of that point does not rest on a mere admission without evidence to support it. As to the second point, the statement read at the annual meeting of 1923 on behalf of the directors in this case mentioned that due allowance was made for bad and doubtful debts; so, although no inquiry is proved, the answer that would have been given had an inquiry been made from the general manager is actually before us. But that so-called directors' report is no part of the “directors' yearly report” under sec. 54 referred to in the charge-sheet, but is a different document altogether.

It is impossible, I think, to distinguish these two cases in principle—Lord Halsbury in what I have quoted was answering the argument which was made before the House of Lords in the same language as was pressed upon us here. This appears from what he said (p. 482):—

“But it is said he has so grossly neglected his duty as a director, that though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable.” And again (p. 484): “And, in-

App. Div.

1925.

REX
v.

BARNARD.

Hodgins,
J.A.

App. Div.

1925.

REX
v.

BAERNARD.

Hodgins,
J.A.

deed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge." He repeats the argument in slightly different terms when he says (p. 484): "And it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded."

Lord Davey refers at length to Mr. Cory's evidence in the following way. Speaking of the weekly and quarterly returns, he says (pp. 491, 492):—

"These returns were laid on the table in the board-room at each meeting of the directors. The comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, shew that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets, submitted by him to the directors, were, in fact, irretrievably bad, and it is difficult to acquit the general manager of improper conduct in including them as assets. The respondent says in his affidavit that the 'weekly states' consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors; and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly states were not consulted by the directors, but they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. . . .

"He (Cory) also said that it was never brought before him that amounts due from bankrupt debtors were included in the balance-sheet of each year, and he never heard of any single case of that kind. It further appeared, from the evidence of other witnesses, that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors."

He then proceeds (pp. 492, 493):—

"In this state of the evidence, my Lords, I ask whether the course of business, at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches

of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a director as would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. . . . It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference."

App. Div.
1925.
—
REX
v.
BARNARD.
—
Hodgins,
J.A.

I have quoted somewhat largely from this case, for it not only discusses facts very similar to what we have here, but sums up the law which may be deduced from such earlier authorities as *Regina v. Esdaile* (1858), 1 F. & F. 213; *Ex p. Overend Gurney & Co.* (1869), L.R. 4 Ch. 460; *Turquand v. Marshall* (1869), L.R. 4 Ch. 376; *Land Credit Co. of Ireland v. Lord Fermoy* (1870), L.R. 5 Ch. 763; *Overend & Gurney Co. v. Gibb* (1872), L.R. 5 H.L. 480; *Couper v. Whitson* (1882), 9 Ct. Sess. (4th ser.) 1115; *In re Denham & Co.* (1883), 25 Ch. D. 752; *In re Liverpool Household Stores Assn. Ltd.* (1890), 59 L.J. Ch. 616; *In re Lands Allotment Co.*, [1894] 1 Ch. 616; *Watts v. Bucknall*, [1902] 2 Ch. 628, [1903] 1 Ch. 766.

It has been both anticipated and followed by authorities here and in England, by some of which we are bound. I refer to *Parker v. McQuesten* (1872), 32 U.C.R. 273; *Re Owen Sound Lumber Co.* (1915-17), 34 O.L.R. 528, 38 O.L.R. 415; *Prefontaine v. Grenier*, [1907] A.C. 101; *Rex v. Lovitt* (1907), 41 N.S.R. 240; *Stavert v. Lovitt* (1907), 42 N.S.R. 449.

In the United States the same principle has been adopted: *Briggs v. Spaulding* (1891), 141 U.S. 132; *Bloom v. National United Benefit Savings and Loan Co.* (1897), 152 N.Y. 114; *Bailey v. Babcock* (1915), 241 Fed. Repr. 501; *Allen v. Roydhouse* (1916), 232 Fed. Repr. 1010; *Dresser v. Bates* (1918), 250 Fed. Repr. 525.

I make further reference only to what is said in *Prefontaine*

App. Div. v. *Grenier*, [1907], A.C. 101, where the Privy Council considered
 1925. the question raised as to the liability of the president of the Banque
 REX de Peuple, and in dealing with the law applicable to it made the
 v. following important statement (pp. 109, 110):—

BARNARD. “In this country questions as to the nature and extent of the
 duty and responsibility of directors and others, in respect of the
 Hodgins, conduct of the affairs of companies, have been frequently under
 J.A. consideration. Attempts have repeatedly been made to render them
 personally liable on the ground that they have trusted the regu-
 larly authorised officers of the company; that they have failed to
 detect, and been misled by, misrepresentation or concealment by
 such officers, when there was no reason for doubting their fidelity.
 But such attempts have not been successful. It is sufficient to refer
 to the case of *Dovey v. Cory*, [1901] A.C. 477, in which the
 subject was fully considered by the House of Lords.

“Their Lordships think that in the absence of any legislation
 in force in Quebec inconsistent with the law as acted upon in
 England, and in the absence of any evidence of custom and course
 of business to the contrary, the Court of King’s Bench was right
 in accepting the English rulings, because they were based, not
 upon any special rule of English law, nor upon any circumstances
 of a local character, but upon the broadest considerations of the
 nature of the position and the exigencies of business.”

I find nothing in the recent *City Equitable* case, 40 Times
 L.R. 664, 853, conflicting with the underlying principle in *Dovey*
v. Cory. The learned trial Judge, Romer, J., absolved all the
 directors and the auditors from “wilful default or neglect.” In an
 appeal by the liquidators against the auditors, this phrase came
 up for discussion. The duty of an auditor involves verification
 and investigation and is thus much higher than that of a director.

In the Court of Appeal Lord Justice Sargant, speaking of the
 words just mentioned, said:—

“In my judgment the word ‘wilful’ in this phrase is of im-
 portance, and means that the officer in question is consciously
 acting, or failing to act, in a reprehensible manner. It may no
 doubt be for him to shew that this is so, and I do not think he
 would be protected if he simply failed to give any consideration
 at all to the question of his duties, if he acted recklessly and with-
 out caring whether he was fulfilling them or not. But, in my judg-
 ment, these words excuse an officer if through mere inadvertence
 or error of judgment, and while endeavouring honestly to carry out
 his duty, he does or omits to do something which apart from these
 words might have rendered him liable.”

Lord Justice Warrington says:—

“I think, therefore, that Mr. Justice Romer was quite right in arriving at the conclusion that a man is not guilty of ‘wilful neglect or default’ unless he is either conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is conscious, in doing that, or omitting to do that, that he was committing a breach of his duty, and also, as he said, recklessly careless whether it was a breach of duty or not.”

The Master of the Rolls says:—

“It is not easy to reconstruct the true position as it stood before the auditors when they were called upon to do their duty in the three successive years in which their conduct is challenged. It is also proper to remember that when a big disaster has occurred, such as the failure of this company, which as I have said was a notable company in its day, there is, on the part of some, a desire to find some scapegoat who can be found to be responsible and possibly to make good some of the losses which have occasioned disaster to so many. But it is the duty of the Court, as far as possible, to think about and see what was the problem presented to the auditors and what was the knowledge that was available to them at the time.”

He then quotes with approval Lindley, L.J., in *In re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279, 287, as follows:—

“It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to any one before suspicion was aroused. The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential.”

I find it impossible to draw any real distinction between the words thus explained by the Court of Appeal in the *City Equitable* case and also by Lord Romilly and Lord Davey (*infra*) and the language of sec. 153, “negligently approving or concurring in a return containing any false or deceptive statement.”

As I have pointed out, the essence of the offence here requires that there shall be in the return a false and deceptive statement; concurrence is merely assent to it, and if it be not known to contain anything false, then certainly no higher standard of responsibility can attach than follows where wilful default or neglect is required, for these words cover recklessness, consciousness of com-

App. Div.

1925.

REX

v.

BARNARD.

Hodgins,
J.A.

App. Div. mitting a breach of duty, and wilfully shutting the eyes to the
 1925. facts before him, as put by the English Court of Appeal.

REX
 v.
 BARNARD.
 Hodgins,
 J.A.

The utmost that can be demanded of directors is, in the language of Lord Romilly (*Rance's Case* (1870), L.R. 6 Ch. 104, at p. 109, note), that he shall not be ignorant because of his "wilfully shutting his eyes to the facts which are before him," which expression Lord Davey ([1901] A.C. at p. 490) understands to include "culpable negligence or reckless indifference by the director in the performance of his duties."

The popular conception of a bank director's position centres upon the word chosen to describe him. It is a complete misnomer, and the sooner it is altered the better. He does not and cannot "direct" as the word is usually understood.

The idea that a dozen directors can each be and act as general managers and conduct the affairs of the bank is absurd. It is not even argued. But, if each of them was required to make separate inquiries—on the theory that they could not trust each other, any more than they could depend on the officers of the bank—they would completely disorganise its business. No business organisation can be carried on on the principle of distrust, as has been well said.

To sum up my appreciation of the meaning and application of this subsection, it is this: If the negligence intended to be punished is want of proper antecedent attention to the duties of a director so as to gain sufficient knowledge to detect any false statement in a proposed return, the statute does not provide for or include it. Instead, it makes the offence consist in negligently performing a present, conscious act, such as signing or approving of the return. If negligence is directed to want of care or recklessness in assenting to the return, such as absence of inquiry and investigation to verify the information given, then it assumes that the right and duty exist to make a present inquiry and investigation into each item, both as to proper classification and value as an asset, and yet involves the consequence of guilt if any false or deceptive item escapes detection, because the presence of any such statement in the return is said to be sufficient to shew that the director was negligent. This view of the section makes the responsibility so onerous and extensive as to make it impossible to doubt that the Legislature never intended such a result.

The facts of this case which were alleged to be relevant were very fully, indeed exhaustively, pointed out and analysed in all five cases, and no scrap of knowledge can be said to have been denied to the Court. It is quite true that the transaction in which

the accused by a trick, while a director, obtained \$350,000 from the bank, is inexcusable, and the fact that he was compelled to give security which if promptly realised might have repaid the amount, does not in any way excuse his conduct. But the charge before us is of such a different kind, and so much narrower in scope, that this reprehensible transaction has in law little bearing. Bad as it was, it has not been shewn to have been falsely represented in the return.

App. Div.

1925.

REX
v.

BARNARD.

Hodgins,
J.A.

I should allude to two arguments presented to us but I think only faintly. One was that, as the report or return under sec. 54 was to be signed "on behalf of the board," each director was individually responsible for its contents.

As the board can act by a majority or by a quorum, the making of the report does not involve or require authority from each individual director, and in a criminal case he cannot be personally held to have made or authorised the report, unless he has had an actual hand in it.

The sending of a proxy has no such effect as was contended for—sec. 32 (6) allows only shareholders to "vote by proxy," so that if the proxy was acted upon it would only indicate that, *quâ* shareholder, the giver of the proxy voted. It is not shewn who held the proxy, nor even that it was voted upon.

In *Lanier v. Rex*, [1914] A.C. 221, 24 Cox C.C. 53, in the Privy Council, Lord Shaw makes some pertinent remarks about "constructive criminal responsibility." The offence charged was under a provision in the Penal Code which enacted:—

"Whoever embezzles, squanders away, or destroys . . . to the prejudice of the owner, possessor, or holder thereof, any goods, money, valuable security, bill, acquittance . . . delivered . . . with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment and a fine not exceeding three thousand rupees (Rs. 3000)."

Money of which he was trustee had been paid into the accused's firm's account, and having later been demanded, he gave security satisfactory to all concerned, but was later prosecuted under the Code, and convicted.

The Acting Chief Justice in the Court below had thus laid down the law:—

"The act is wilful and fraudulent if he ought to foresee that a prejudice can result. It is not sufficient for him to state that he did not wish to cause prejudice, nor can he defend himself by saying that he did not foresee the result. He ought to have fore-

App. Div.

1925.

—
REX

v.

BARNARD.

Hodgins,

J.A.

seen it. It was his duty not only to himself, but to those for whom he acted, to take such precautions and to have exercised such foresight as would not have involved him in the possibility of causing prejudice."

In reference to this remark Lord Shaw says:—

"In so far as this is a statement of law, it is a proposition of constructive crime, and does not appear to be warranted by any general principle of law or by any sound interpretation of the section. . . .

"Their Lordships are of opinion that the rules thus laid down by the Judge are in no respect safe guides in a matter of criminal responsibility. If they were, all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in judgment, or even for sanguine forecasts about investments, although their motives had been generous, and their conduct undeniably honest. These propositions are not made in order to mitigate the rigour of that civil responsibility which must attach to all the dealings with the property of others; but they are so elementary as grounds of distinction between the categories of liability in a civil as distinguished from a criminal suit, that their Lordships regret that they appear on this occasion to have been left out of judicial view."

Appeal allowed.

[APPELLATE DIVISION.]

1925.

REX v. GOUGH.

June 27.

Criminal Law—Director of Bank—Offences against Bank Act, 1913, sec. 153—Making, Using, or Concurring in False Monthly and Annual Returns to Minister of Finance—Secs. 54 and 112 of Act—Schedule D.—Form of Declaration—Correctness of Monthly Return according to Books of Bank—Belief of Director in Correctness—"Condition of the Bank"—"Financial Position of the Bank"—"Knowledge and Belief"—Evidence as to Annual Return—Absence of Defendant — Knowledge — Inference—Onus—Negligence—Reliance on Information Given by Officers.

The defendant, a director and vice-president of the Home Bank of Canada, was tried by a County Court Judge without a jury and found guilty upon charges of six offences against sec. 153 of the Bank Act, 1913. The charges were in respect of two returns made by the bank to the Minister of Finance, one being the monthly return for December, 1922, and the other the annual return for the bank's financial year, ending on the 31st May, 1923. The charges were in substance: that each return was false and deceptive; that the defendant unlaw-

fully made each of them (clause *a* of sec. 153(1)); that he unlawfully used each of them with intent to deceive or mislead the Minister (clause *b*); and that he negligently prepared, signed, approved, or concurred in each of them (subsec. 2). Section 54 of the Act specifies the requirements of the annual return, and sec. 112, as qualified by subsec. 3(*b*), those of the monthly return. Schedule D., appended to the Act, contains forms of certificates to be signed and sent to the Minister with each monthly return. The declaration to be signed by the president or vice-president and general manager, and in this case signed by the defendant, reads: "We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct, and shews truly and clearly the financial position of the bank:"—

1925.
—
REX
v.
GOUGH.

Held (on appeal from the conviction), that a monthly return made correctly in accordance with the books of the bank fulfils the requirements of schedule D.; the words "the financial position of the bank" mean its financial position according to the books of the bank; and the words "condition of the bank," in sec. 112, do not mean its actual condition or financial position, but merely what "to the best of the knowledge and belief" of the declarant is its financial position according to the books.

The return, as was conceded, correctly shewed the condition of the bank according to the books, and was, therefore, not false or deceptive.

The conviction in respect of the monthly return should be quashed.

The defendant was absent from Ontario when the annual statement was adopted by the board of directors and so continued until after it was sent to the Minister. There was no evidence that the defendant made, prepared, or took any part in the making or preparation of that statement, or that he used it, saw it, approved of or concurred in it, or had any knowledge of its contents; but it was argued that, as he knew it was the duty of the board to prepare such a statement, to submit it to the shareholders at their annual meeting, and to send it to the Minister, the defendant was bound by the action of the board, and his guilt might be inferred because he had not manifested dissent:—

Held, that the defendant was entitled to assume that the board would make a true—not a false—return; and, unless he knew or had some reason to believe that it was false, no inference against him could be drawn from the fact that he did not manifest dissent.

There were no circumstances warranting an inference of guilt; the onus was on the Crown to prove guilt, and in this it had failed.

The defendant believed in the integrity and capacity of the president and general manager of the bank and relied upon the information (which proved untrue) given by them to him as to the bank's condition. He had no reason to doubt their truthfulness, and therefore, though misled by them, was guilty of no negligence.

The conviction in respect of the annual statement should also be quashed.

THE charge against Richard P. Gough, a director and vice-president of the Home Bank of Canada, was also made before and tried by COATSWORTH, Co.C.J., in the same way as in the two cases immediately preceding this. The charge contained six counts, similar in form to the three counts set out in the *Smith* case, *ante*: three of the counts related to a monthly return made on the 18th January, 1923, and the remaining three to the annual return of the 26th June, 1923, as in the *Smith* case.

1925.
REX
v.
GOUGH.

The learned County Court Judge on the 20th January, 1925, found the defendant guilty on all the six counts, giving reasons as follows:—

Six charges are set forth in the charge-sheet herein. The first three relate to the monthly statement of the 30th December, 1922, signed by the accused on the 18th January, 1923; and the last three to the annual statement of the 31st May, 1923, presented to the shareholders at the annual meeting on the 26th June, 1923. As to each of them the allegations are that the accused did: (1) make a wilfully false or deceptive statement; (2) unlawfully use false or deceptive statements; (3) negligently sign, approve, or concur in an account containing false or deceptive statements.

I find, upon the uncontradicted evidence, that each of the statements above mentioned is false or deceptive within the meaning of sec. 153 of the Bank Act, 1913. The monthly statement does not, as required by sec. 112, "exhibit the condition of the bank" or shew "truly and clearly the financial position of the bank," and the annual statement is not, as required by sec. 54, "a clear and full statement of the affairs of the bank."

The accused denies liability for either statement, alleging that they were prepared by the officials from the books of the bank and certified as being correct, and he was entitled to and did rely upon them as complying with the Act, and they were received without objection by the Department of the Minister of Finance at Ottawa. Also, as to the annual statement, he claims not to be responsible because he was absent from Ontario on the 26th June, 1923, when it was distributed to the shareholders at the annual meeting.

On the 3rd November, 1916, the board elected the accused a director of the Home Bank to replace John Persse, a Western director who had resigned. In June, 1917, and each subsequent year thereafter, he was re-elected by the shareholders. During his term of office there were 221 meetings of the board, of which he attended 182. On the 6th December, 1916, he was elected vice-president by the board of directors and re-elected vice-president each subsequent year.

In his personal business and undertakings he had been remarkably successful, and his great experience, conspicuous ability, and high standing in the commercial world, stamped him as one whose knowledge and capacity eminently qualified him for an important place in banking circles, and it seemed quite natural that he soon became vice-president, and the announcement of his going on the board of directors and becoming vice-president must have had the effect of strengthening the bank in public confidence. This,

no doubt, was the reason for securing him, as his evidence indicates that neither he nor his firm transferred their current accounts to the Home Bank.

The accused entered upon his offices as director and vice-president with a very accurate conception as to his duties and the responsibilities attaching to them, which was expressed quite clearly on the 13th May, 1918, when sending a letter of remonstrance to the president in regard to unauthorised investments. He writes: "I was astounded, for it was to attend to matters like this that the shareholders elected directors, and they were never asked to consent to our turning over our duties to any officer. It did cut me personally, for I felt also that directors should feel to each other as partners, and for you to ask me to join you on the board and then to find out that you run things as though I was not a member; I could not stand that." And later: "Now, we know it is possible for the executive to put things through without the consent of the directors. It is our duty to the shareholders to give them the protection they think they have."

The above demonstrates that he understood what he had undertaken as a director, and the responsibility would be still greater for the vice-president, owing to his exalted position and the further fact that in the president's absence he was acting president. This opened out to him more freely channels of information as to the affairs of the bank, which, though not closed even to the ordinary director, were not nearly so available as they were to the president and vice-president, particularly when the latter was acting as president.

It seems hardly necessary also to refer to sec. 19 of the Bank Act, which reads, "The stock, property, affairs and concerns of the bank shall be managed by a board of directors."

The year 1916 was an eventful one for the Home Bank. The Western directors, dissatisfied with the management and condition of the business, complained to the Minister of Finance, and an investigation was ordered. The Minister was so sufficiently reassured that, with a warning as to methods, he permitted the bank, under the existing circumstances and with the assurances given, to go on in business. One of the principal assurances given the Minister was as to management. The eminent counsel of the bank, with evident authority, on the 20th March, 1916, wrote to the Minister informing him that the then general manager and his son, the assistant general manager, were to be given a leave of absence, and that Mr. Haney was appointed vice-president, with the *de facto* position of president, and would make the affairs of the bank the

1925.

REX

v.

GOUGH.

1925.
REX
v.
GOUGH.

first charge upon his time. He also stated that "Mr. Machaffie, manager of the Winnipeg branch, in whom Mr. Haney and Mr. Crerar have great confidence, will come to Toronto at once (he has been wired for) to assist Mr. Haney in investigating the general position, etc. Mr. Machaffie is an old bank-manager, and was trained in the Merchants Bank and the Bank of British North America. He has been with the Home Bank about 7 years, I think, and most of the time in Winnipeg."

Again on the 23rd March, 1916, the same counsel wrote again to the Minister: "Mr. Machaffie, manager of the Winnipeg branch, has been brought to Toronto to act as Mr. Haney's chief assistant. Mr. Machaffie is regarded as one of the ablest officers in the employment of the bank. He is a trained banker, and before coming to the Home Bank he was in the service of the Merchants Bank and the Bank of British North America. He is in no way responsible for the general management in the past and has managed the business in Winnipeg satisfactorily."

Mr. Machaffie, thus heralded, arrived in Toronto in March, 1916, but was not until the 19th December, 1916, appointed to the position of assistant to the president, who was then acting as chief executive, and, to all intents and purposes, general manager. It was probably a great shock to Mr. Machaffie, a professional banker, coming to Toronto at a time when the business was in a very precarious position, and above all requiring a capable, expert, and experienced banker to bring it successfully through, to find the bank being operated by an amateur banker. The methods were such that Machaffie, the trained banker, very soon came into collision with the president, the amateur banker, and finally ceased attending board meetings, and was, after what must have been for him two very unpleasant years, paid off with \$15,000. Without discussing his motives, I may say that, when he left, the bank lost the only man who in this Court has given evidence of having taken the trouble to arrive at a clear understanding of the imminent peril of the bank, coupled with a constructive policy for saving it. After they got rid of the trained banker, things went from bad to worse. The defective management which had existed before continued through the stages of amateur management and was finally perpetuated, partly on sectarian grounds and partly because the board had not the initiative to investigate or the courage to insist upon the enterprise being carried on as a real bank.

It is significant also that Machaffie urged upon the president to have an inspection of the Toronto office and offered himself to organise an inspection department and to do it. This was ignored,

although the Toronto office had not had a liability inspection for a number of years.

The rules and regulations as to furnishing inspection reports and statements were not lived up to by the chief official or insisted upon by the board. Orders passed by the board for certain information, reports and statements, were ignored and never followed up by a further demand.

If the directors now say that they were depending upon the general manager, then why the necessity for a board of directors, who, as already pointed out, under sec. 19 of the Act, are the managers of the bank? They were not entitled to delegate their duties to others.

The difficulty of the directors inspecting the books has been stressed. With that I to some extent agree, but what, in my opinion, the directors should have done, and what any ordinarily prudent business man would have done, was to ask for and require details to be furnished shewing how the officers arrived at the various items such as profits, interests, dividends, overdrafts, bad and doubtful debts, call loans, current losses, securities and valuation of all securities; the annual fluctuation in deposits and as to the necessity for putting up on the 31st May each year an appearance of prosperity which did not in fact exist. They, however, accepted, apparently without inquiry or analysis, each statement brought on by the general manager, and contented themselves with his mere verbal assurance that it was all right. This they should not have done.

The accused had not been very long on the board before the Western directors dropped out one by one. In fact he took the place of one of them. The Western branch of the board ceased to exist. Then also the Grain Growers of the West got rid of their stock. The Toronto directors had commenced to resign, and various excuses for resignations were given. No man said he was afraid, but capable men made their exit one after another.

These resignations should have been a warning to the accused, but apparently were not. He had, in addition to them, specific warnings which negative any defence based on ignorance.

1. On the 15th February, 1918, Machaffie wrote to him that there had been only one liability inspection of the Toronto office in ten years, and that such a state of affairs had only one parallel in Canadian banking and that was the Ontario Bank, which ended in failure. At the same time he enclosed a copy of a letter which he had written to the president emphasising the importance of an inspection of the Toronto office and also reflecting upon the fact

1925.

REX
v.
GOUGH.

1925.
REX
v.
GOUGH.

that the directors were not informed about large and important accounts, and the depositors were deprived of the measure of security contemplated by Parliament, and that the annual reports were misleading, and significantly suggesting that the directors and others were bringing themselves within the penal clauses of sec. 153 of the Bank Act.

2. Again, on the 26th March, 1918, a little over a month later, Mr. Machaffie wrote to the accused a second letter, containing the suggestion that the capital was impaired and proposing an investigation through the president of the Canadian Bankers Association, in a private and quiet way, to ascertain the exact position of the bank.

3. On the 13th May, 1918, about the time that the board settled with Machaffie, Mr. Daly wrote a very strong letter to the then president, pointing out the improper practices which were being carried on, investments being made without the approval of the board, lending moneys on the basis of participation in the profits, advances to companies not justified, and that certain of such advances had put the bank in a very precarious position, and as to the non-appointment of a general manager, and the importance of retrenchment.

4. The accused himself, on the 13th May, 1918, no doubt in collaboration with Mr. Daly, wrote a letter of remonstrance to the president and complained about and protested against the manner in which loans were being made and credits given without the authority of the board.

5. Finally, in August, 1918, Machaffie, even after he had been settled with, wrote to the Minister of Finance criticising the manner in which the affairs of the bank were being carried on, and the fact that the president and his friends had personal interests in bank transactions, the result of which was disastrous to the bank.

During this period the accused appeared to have been sufficiently alarmed to take an initial step to remedy existing evil, but allowed himself to be lulled to security in the most trivial manner. Also in the beginning of 1920, shortly after what might not unfairly be termed the Barnard raid on the funds of the bank of about \$350,000 (which afterwards grew to over \$1,000,000), he very properly demanded Barnard's resignation, but was again hushed into quiescence, and later on, in 1921, when he went with another director to the Montreal branch to ascertain the condition of the Barnard account, he saw the ledger but took no further action.

It is difficult to comprehend why, with so many and repeated warnings before his eyes and ringing in his ears, the accused, an outstanding business man, did not glance over the financial statement book, which was before the directors every week, or at least demand particulars of large items in the statement, such as bad and doubtful debts, overdrafts, profits, reserves, etc., and also have the securities valued and the Toronto office inspected. Had the accused done this in connection with any of the statements he would have brought on a crisis years ago. Any ordinarily prudent and judicious business man would have done so, and a director should have taken such a precaution, and a director plus vice-president is one from whom a great deal more might fairly have been expected.

Knowing what he did of the transactions which were large and perilous to the bank, the very smoothness of the surface of the statements was suspicious and should have aroused an inquiry with the determination as a trustee to find out just how bad things were. To quote a word frequently used in these trials, the statements should have reflected the actual condition of the bank with relation to the accounts which the directors knew were in a state to cause extreme anxiety or more. It is impossible to understand on any rational grounds why the accused did not more effectively follow up the repeated warnings he received.

It must be borne in mind that he signed not merely the one monthly statement mentioned in the charge-sheet, but 17 of them, probably all of them equally false and misleading. Apparently, with trifling inquiries, everything was taken for granted. Reasonable demands for details were not made.

The declaration he signed in each of the 17 monthly statements, that it did shew "truly and clearly the financial position of the bank," meant something or it would not have been there.

With regard to the defence that the accused was absent from Ontario on the 26th June, 1923, and therefore could not be held responsible for that yearly statement, I can only refer to my judgment in the case against C. A. Barnard, who raised a similar defence. Referring to the details of that judgment for more extended reasons on this point, I will repeat here that in my view personal presence of the accused at that meeting was not essential to create the offence charged.

It is a directors' statement and one which each outgoing director, whether at the moment present or absent, was on that date presenting to the shareholders in Toronto as his account—"a clear and full statement of the affairs of the bank," and of the assets, resources, and liabilities of the bank.

1925.
REX
v.
GOUGH.

1925.
REX
v.
GOUGH.

No director took any part in the reading of the statement. The real offence consisted in causing such a statement to be prepared and given out as the directors' statement and as a clear and full account of the business of the bank for the year and of the assets, resources, and liabilities thereof, and presented by the outgoing directors to the shareholders.

As is apparent, I have not attempted the impossible task of analysing the voluminous testimony given, but simply stated the main points in evidence upon which my judgment is based.

It is my duty, in view of the foregoing, to find the accused guilty as charged on all six counts.

The defendant appealed from the conviction.

May 12, 13, 14, 15, 18, and 19. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

W. N. Tilley, K.C. (with him *R. H. Parmenter*, K.C.), for the appellant. It is important to bear in mind the difference between the monthly statement and the annual statement as affected by the provisions of the Bank Act. The monthly statement is signed and sent to Ottawa, but does not come before the board. It must be made up and sent in within the first 20 days of each month; it is published in returns by the Finance Department at Ottawa. It is required by sec. 112 of the Bank Act, 1913. The word "compilation" is used—the statement has to be compiled from books and returns. In the Bank Act of 1923, "compilation" has been changed to "preparation." Schedule D. is made part of sec. 112. A statute which imposes a penalty must be strictly construed. The Crown must prove guilt. If the statute itself is ambiguous, and the accused is not clearly brought within its language, he cannot be hit by the penal clause. If there is a reasonable doubt as to what the language requires, there cannot be a conviction. The statement must be prepared in a hurry and does not come before the board. It is to be made up by the chief accountant, who is to declare that the return has been prepared under his directions and is correct according to the books of the bank. If the statement is prepared according to the books of the bank, no offence is committed. On the finding of the trial Judge, the appellant is not guilty of intentional misstatement in the monthly return. As vice-president, in the absence of the president, the appellant signed the certificate annexed to the return, that it was made up from the books of the bank, that it was true to the best of his knowledge and belief, that it was correct, and shewed truly and clearly the

financial position of the bank. The learned trial Judge misread that declaration. He does not find that the appellant had knowledge and belief inconsistent with the truth of the statement. The Crown must establish falsity in two places to make the declaration false as to the appellant. It must be shewn that he signed a false statement, and that the statement that the return, to the best of his knowledge and belief, shews the true condition of the bank, is false also. If the appellant had known that the books did not truly shew the bank's condition, his statement would not have been true to the best of his knowledge and belief. In the Bank Act of 1923, important changes have been made—the return under that Act is no longer a mere compilation, it is a statement that requires values to be inserted rather than amounts. In the new section 112 the time for making the monthly return is enlarged and other changes are made [Counsel referred also to the new sections 113 and 114.] The words “to the best of my knowledge and belief” are contained in the form of a declaration (schedule D.), and are intended to protect directors who are acting honestly in signing. The chief accountant prepares the statement, and he is the proper person to bring it into existence. The directors are not under any obligation to check it with the books, so long as, according to their belief and such knowledge as they have, it is correct as a statement from the books and shews the condition of the bank and is according to the form. Then, dealing with the annual statement, the appellant took no part in it, he was not present at the annual meeting, being away from Toronto at the time it was held. The statement is the directors' statement so far as they are responsible for bringing it into being, but it is not the statement of each individual director. It is the statement of the board, controlled by the majority. The appellant cannot be held guilty under sec. 153. He is not negligent because he is not there to act, and he is not wilful because that involves a mental condition which is entirely absent. The accused under sec. 153 must be an actor in the transaction. Whatever duty rests upon him, it is his duty to see that sec. 54 is carried out, that is, he would be liable to a penalty for not seeing that the general manager signed the report and the president signed it on behalf of the board. Responsibility is to be judged by considering the matters prior to the date when the report became a completed thing. “Wilfully,” in sec. 153, is not to be confounded with “indifferently” or “recklessly.” See the definitions of “wilful” in Russell on Crimes, 8th ed., vol. 2, pp. 1688, 1689; *Regina v. Senior*, [1892] 1 Q.B. 283, 290; “Wilfully,” in subsec. 1(a) of sec. 153, is coupled

App. Div.

1925.

REX
v.

GOUGH.

App. Div.
1925.
REX
v.
GOUGH.

with "false." Here it must be an intentional falsity—culpable intention. When you come to "negligently," in subsec. 2, you have the other branch of deceit—reckless indifference to consequences. It all depends upon the particular event that is aimed at in this section. The negligence must be such as would expose the person guilty of it to an action for deceit. If a director acts honestly and according to his best judgment, he cannot be prosecuted for negligence, because he has not been negligent in the way the Act intends. The rule for actions of deceit is found in *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30. The statement to be sent in once a year involves the same requirements as to action and the same method as to filling in as the monthly statement—it does not require a valuation, but only the filling in of amounts, except in two instances specified in sec. 54 (2) (g) and (i). It is different in the Act of 1923. If the form is filled up in accordance with the requirements of the statute, the statement cannot be made the basis of a prosecution for making or concurring in a false or deceptive statement. The appellant is not concerned with the report that was read at the meeting by the assistant general manager, acting as secretary of the meeting. [Reference to the correspondence and transactions beginning in 1915 to which the County Court Judge in his reasons attached importance.] The appellant shewed deceit by both Mason, the general manager, and Daly, the president, and their interest required them to deceive the appellant. Periodically something was brought up in connection with the bank that resulted in inquiry and investigation under competent direction that would satisfy any reasonable director. Counsel referred to *Regina v. Hincks* (1879), 24 L.C. Jurist 116; *Parker v. McQuesten* (1872), 32 U.C.R. 273; *Rex v. Lovitt* (1907), 41 N.S.R. 240; *Stavert v. Lovitt* (1907), 42 N.S.R. 449; *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 664, 853; secs. 19 and 29 of the Bank Act, as to the duties of directors. The board cannot so limit the authority of the general manager as to make it inconsistent with the performance of his duties as defined by the Act. When the directors appoint a general manager or executive officer to do certain work, they are not delegating their duties—the general manager does not act as the delegate of the board, but by virtue of his capacity as a servant of the bank. The directors are entitled to believe that he is performing his duties honestly. They are entitled to trust him until something occurs to make them suspicious, to put them on inquiry. They are entitled to act upon the word of any official who has the power to do business. There is no way in which the affairs of the

bank can be carried on if the directors have to go behind the information given them by responsible officers. The duty of inquiry is satisfied if the inquiry is made of the general manager and his answer appears to be satisfactory—that is sufficient unless the director has reason to suspect the honesty of the general manager. If the directors are entitled to trust the general manager with a duty, they are entitled to take his report as to the performance of that duty. [MAGEE, J.A.:—It is a grave question whether the onus is not on the appellant when matters are shewn to be within his peculiar knowledge.] The onus does not change—even where a man is found with stolen property, the jury must not be told that it is for him to explain: *Rex v. Lewis* (1919), 14 Cr. App. R. 33. There is no ground for the conviction as to the monthly return—it was not false, and certainly was not false to the appellant's knowledge. The yearly return was not false, and there was no concurrence upon his part in it and no negligence upon his part in connection with either statement. The conviction ought to be quashed.

D. L. McCarthy, K.C. (with him *McGregor Young*, K.C., and *J. C. McRuer*), for the Crown. The return of December, 1922, signed by the appellant on the 18th January, 1923, is made in compliance with sec. 112 of the Bank Act, 1913, and schedule D., and the Crown charges that in that return certain false statements occurred, and that they were made with the knowledge of the appellant, having in mind his position and his knowledge of the bank's affairs. The proper inference is that the return was made with the intention of deceiving the Minister, and to the knowledge of the appellant, the purpose being to keep the bank alive. The monthly statement was false in several particulars, the first being that it truly represented the financial condition of the bank. [Others were specified by counsel.] A distinction should be drawn between a bank statement under sec. 112 and a statement of the banking company's affairs as required by sec. 54. There must be a declaration that the return is made up from the books of the bank, and that to the best of the declarants' knowledge and belief it is correct, and the declaration is to be signed by the president and general manager. The words "to the best of our knowledge and belief" apply only to the books, and not to the condition of the bank. The monthly return is a farce if the argument for the appellant is correct. Section 19 makes the directors responsible for the condition of the bank unless they delegate their duties to some one else. In this case there has been no delegation of duty; therefore, a director who is responsible for the condition of the

App. Div.

1925.

REX

v.

GOUGH.

App. Div.
1925.
REX
v.
GOUGH.

bank is the only man, except the general manager, who knows the true financial condition of the bank. The duties are divided: the accountant declares that the return is prepared under his directions and is correct according to the books of the bank; the president and general manager say that to the best of their knowledge and belief that is correct; but they go one step farther and speak in regard to something as to which from lack of knowledge the accountant cannot speak—they say that the statement shews truly and clearly the financial position of the bank; and, therefore, their statement is as to the financial condition. Is there not a duty cast upon them to see that this report does in fact exhibit the real financial condition of the bank? In regard to many of these loans there was surely some obligation upon the appellant to make inquiry. As far as the books are concerned, the appellant may say that they are correct as far as he knows; but when he says that the statement sets forth clearly and truly the position of the bank, must you absolve him from all knowledge of the condition of the bank? If a director knows that the statement does not reflect the true condition of the bank, then he ought not to sign it or he ought to make some reservation or give some notice to the Minister. If he does sign the return with the knowledge that it does not clearly shew the true financial position of the bank, he is guilty of wilful default or negligence. The words “knowledge and belief” do not apply to the latter part of the sentence. If the director signs with knowledge of the falsity or if he ought to know of the falsity, it is either wilfulness or negligence. [Discussion of the evidence.] The County Court Judge having found that the proper deduction to be made from the facts was that the appellant was aware of the facts and circumstances and the falsity which appears in the report, in order to support the finding reference must be made to the matters which were before the board. It was undoubtedly on the appellant’s own testimony that the Judge found, as a proper inference to be drawn, that the appellant had knowledge of some of the false statements and that he was negligent as to some of the others, and that the return was made for the purposes of deception. A proper conception of the appellant’s testimony can be got only by reading the whole of it. Under sec. 1014 of the Criminal Code (as enacted by 13 & 14 Geo. V. ch. 41, sec. 9), an appeal lies only on a question of law or if there has been a miscarriage of justice. Reference to *Rex v. De Bruge* (1924), 55 O.L.R. 507; *Rex v. Epstein* (1925), 56 O.L.R. 587. Section 54 of the Bank Act, 1913, does not require action by the board of directors. The statement of the affairs of the bank does not come before

the directors meeting as a board. It is a statement for which each director individually is responsible; and, while it has to be signed on behalf of the board by the president or vice-president, that does not take away from the individual responsibility of each director. That a director should know what the officers are doing is made clear by subsec. 3. Some of the matters specified in subsec. 2 are matters peculiarly within the functions of the directors, and were not delegated to the general manager or any officer of the bank. There is under sec. 54 a direct responsibility which cannot be delegated and which cannot be assumed by the board as a whole, acting as a board, as distinguished from the outgoing directors. The fact that a director absents himself does not relieve him from responsibility for the financial statement, profit and loss account, or the statement of the directors, which was read to the shareholders by one of the officials. In regard to sec. 153, it has been suggested that the Crown must prove deceit and therefore must prove knowledge. Under the old section, R.S.C. 1906, ch. 29, sec. 153, anybody who signed, made, or concurred in a statement was assumed to have done so wilfully, and there was no escape. The effect of the section in the Act of 1913 is to enable the accused to give reasons to shew that he did not act wilfully and so bring himself under the negligence clause. Negligence surely does not require deceit in a case of this kind. In this case, a man has to do an act. He must make a return. If in that return a false statement appears, it must be the result of wilfulness or negligence, because to do an act requires a mental effort, a conscious act of the man's mind or will. He knows he has to do something: if he leaves it undone, he does wrong. If he does it, he knows it is because he has to do it; and, if he has to do it, he knows that it must contain true statements. If it contains false statements, they are there as the result of wilfulness or negligence. The law presumes wilfulness, but the presumption may be rebutted by an explanation that it is the result of honest oversight or mistake or belief in a different state of affairs. There is a clear distinction between the wilful clause and the negligent clause. Negligence in this case, having in mind that a duty is to be performed, means the performance of that duty in an indifferent or careless manner. A man who is recklessly indifferent may still be wilful. In this case, the trial Judge found that the appellant knew, and therefore that what he did was done with knowledge or recklessly without regard to whether it was true or false. In the Act of 1906 there was no excuse on the ground of negligence; but under the Act of 1913, a distinction is drawn between wilfulness and negligence. The appel-

App. Div.

1925.

REX
v.
GOUGH.

App. Div.
1925.
—
REX
v.
GOUGH.

lant used the yearly statement with intent to deceive by sending it to the Minister. It was sent with the object of deceiving the Minister as to the true state of the bank's affairs. The sending is the act of the directors. The Act requires it to be sent. There is evidence upon which the County Court Judge could have found or could have based a reasonable and proper conclusion as to the knowledge of the appellant in this transaction, and this Court should not interfere with it. In *Rex v. Epstein, supra*, the appellate Court thought that the proper inferences to be drawn from admitted facts were at variance with those drawn by the trial Judge. But here the trial Judge must have based his findings on the examination and cross-examination of the accused. The learned Judge had the opportunity of seeing and hearing him, which this Court has not had. Therefore, the application for leave to appeal on the facts should not be granted; and on the law the appeal should be dismissed for the reasons stated.

Tilley, K.C., in reply, dealt with the facts.

June 27. The judgment of the whole Court upon the charges with respect to the monthly return and the judgment of the majority of the Court upon the charges with respect to the yearly statement were read by MULLOCK, C.J.O.:—The accused, a prisoner in close custody, was charged before the Judge of the County Court of the County of York, exercising criminal jurisdiction, with having committed certain offences contrary to the provisions of sec. 153 of the Bank Act of 1913 (3 & 4 Geo. V. ch. 9), consented to be tried by a Judge without a jury, and pleaded not guilty. He was tried by the Judge and found guilty of the six offences charged, and the appeal is from such decision.

The charges were in respect of two returns made by the Home Bank of Canada to the Minister of Finance and Receiver-General, one being the monthly return for the month of December, 1922, and the other the annual return for the bank's financial year, ending on the 31st May, 1923. As to these returns the charges are in substance that each return was false or deceptive, and that the accused (a) unlawfully made each of them, and (b) that he unlawfully used each of them with intent to deceive or mislead the Minister, and (c) that he negligently prepared, signed, approved or concurred in each of them.

Section 153 of the Bank Act is as follows:—

“ 153. (a) The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank, or (b) the using of any false or

deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank with intent to deceive or mislead any person, is an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding five years.

"2. Every president, vice-president, director, auditor, general manager or other officer of the bank or trustee who negligently prepares, signs, approves or concurs in any account, statement, return, report or document respecting the affairs of the bank containing any false or deceptive statement shall be guilty of an indictable offence punishable, unless a greater punishment is in any case by law prescribed therefor, by imprisonment for a term not exceeding three years."

The accused signed the monthly return in question, and it was in due course sent to the Minister. In order to decide whether this return was false or deceptive, it is necessary to determine what the Bank Act requires it to shew.

Section 54 of the Bank Act specifies the requirements of the annual return, and sec. 112, as qualified by subsec. 3(b), those of the monthly return. An examination of these sections indicates fundamental differences between the requirements of the two sections. The annual statement must shew the balance of profits as from profit and loss account referred to in subsec. 4 of sec. 54, and must be accompanied by a profit and loss account for the financial year. The monthly statement requires no reference to profits or losses.

In the annual statement, Dominion and Provincial Government securities, railway and other bonds, debentures and stock, are to be set forth in the list of assets, at a sum not exceeding their market value, whilst in the monthly statement their face value is to be given. In the annual statement the amounts owing on current loans (other than loans not exceeding 30 days) must not be set forth in the list of assets at their face value, but only at their face value after deducting therefrom a rebate for unearned interest, whilst in the monthly statement their face value alone must be given. In the annual statement in the list of assets, the amount to be set forth in respect of overdue debts is not their face value, but only their value after deducting therefrom estimated losses, whilst in the monthly statement it is their face value that is to be given.

Subsection 3(b) of sec. 112 says:—

"The return last received from any such branch, exhibiting as far as that branch is concerned the condition of the bank at the

App. Div.

1925.

REX

v.

GOUGH.

Mulock.

C.J.O.

App. Div. date for which it purports to be made, may be used in the *com-*
1925. *pilation* of the monthly return called for by this section."

REX
v.
GOUGH.
Mulock.
C.J.O.

Section 54 contains no such provision, excludes the idea of the return being a mere compilation, and enacts that the annual statement must be "a clear and full statement of the affairs of the bank, exhibiting, on the one part, the liabilities of the bank, and, on the other part, the assets and resources thereof."

Further, the annual statement must have attached thereto the report of the auditor (sec. 56, subsec. 21), and sec. 56, subsec. 20(d), declares that it shall be the duty of the auditors to satisfy themselves that the statement "is properly drawn up so as to exhibit a true and correct view of the state of the bank's affairs according to the best of their information and the explanations given to them, and as shewn by the books of the bank." The auditors are not required to make any return in respect of the monthly statements, but instead thereof the accountant is to certify as follows (schedule D.): "I declare that the above return has been prepared under my directions and is correct according to the books of the bank;" and the president, or vice-president, and general manager are to certify as follows: "We declare that the foregoing return is made up from the books of the bank, and that to the best of our knowledge and belief it is correct, and shews truly and clearly the financial position of the bank." The meaning of these declarations by the president or vice-president and general manager must be interpreted by reference to the requirements of schedule D. Section 112 simply requires schedule D. to be filled up in accordance with the books. If, in the present case, this was done (which on the argument was conceded), then, if the accused believed that the return was correct and that it shewed truly and clearly the financial position of the bank, as called for by sec. 112, he committed no offence against the provisions of sec. 153, and it was for the Crown to prove that he knew or believed or had reason to believe the return to be incorrect.

Before discussing the facts, I would point out the meaning which, in my opinion, Parliament intended to be given to the words "financial position of the bank," in the declaration at the foot of schedule D. These words are not, I think, used in an unqualified sense, but in the sense indicated by the requirements of schedule D.; and as illustrating this qualified sense I would again observe that schedule D., in this respect differing from sec. 54, requires the amount of all loans, whether due or overdue, to be included in the list of assets without any deduction for bad or doubtful debts. This provision applies to every bank in Canada,

some of them having outstanding loans amounting to hundreds of millions of dollars. In its relation to those loans, the true financial position of a bank is that those amounts owing, whether good or bad or partly good and partly bad, are assets of the bank, and schedule D. requires them to be stated at their face value, and if so stated they truly and clearly shew the financial position of the bank, that is the amount owing to the bank in respect of them, and this qualified meaning must be given to those words in their relation to every other item in schedule D. Further, sec. 112 requires the monthly statement to be sent to the Minister within the first twenty days of each month, and to "exhibit the condition of the bank on the last juridical day of the month last preceding." Whilst doubtless it is practicable for Canadian banks within that period to make a return of their financial position as it appears in the books, it would seem to be impossible for each bank in Canada within that period to make a return shewing absolutely its financial position at the end of the previous month. It is not to be assumed that Parliament imposed on banks a duty incapable of being performed. For these reasons, it seems to me that the declaration at the foot of schedule D. must be interpreted as meaning the financial position of the bank according to the books, whilst the annual statement must shew the real financial position of the bank. I, therefore, am of opinion that a return made correctly in accordance with the books of the bank fulfils the requirements of schedule D., and that the words "the financial position of the bank" mean its financial position in accordance with the books of the bank.

Discussing, then, first the monthly return, with all respect I think the learned trial Judge has misinterpreted the meaning of the words "condition of the bank" in subsec. 2 of sec. 112, and of the declaration at the foot of schedule D. which the accused signed. In his reasons for judgment, the learned Judge says: "The monthly statement does not, as required by sec. 112, exhibit the condition of the bank or shew truly and clearly the financial position of the bank." Section 112 does not, in my opinion, require the monthly statement to shew the actual condition, or the actual financial position, of the bank, but merely what "to the best of the knowledge and belief" of the declarant is its financial position within the meaning of sec. 112, namely the liabilities and the face value of the assets, including the face value of indebtednesses to the bank, and this information is correctly stated in the return.

Further, even if the words "condition" and "financial position" be given their widest possible meaning, nevertheless if the

App. Div.

1925.

REX

v.

GOUGH.

Mulock.

C.J.O.

App. Div.

1925.

REX

v.

GOUGH.

Mulock,
C.J.O.

accused honestly and to the best of his knowledge and belief thought the return to be correct, he committed no offence. It is unnecessary to point out the difference between saying that the return "is true" and saying "to the best of my knowledge and belief" it is true.

The learned trial Judge has ignored the qualifying words, interpreting the declaration as an unqualified statement as to the bank's position, whereas what the accused declared was that according to the best of his knowledge and belief, etc. The accused is entitled to the protection of these words. For the Crown to succeed, it was bound to prove not only the incorrectness of the statement, but also knowledge or belief of the accused that it was incorrect. This the Crown failed to prove. The accused swore that he believed the return to be true, and his evidence on the point stands uncontradicted, nor has the learned Judge questioned its correctness. Thus the uncontradicted and the unchallenged belief of the accused in the correctness of the return is a complete answer to the charge in respect of the monthly statement.

Further, being of the opinion, for the reasons already stated, that sec. 112 does not require the return to shew the actual or real position of the bank, but only its position as shewn by the books, and inasmuch as it correctly shews that position, the return was not false or deceptive, and therefore on this ground also the convictions in respect of the monthly return are bad, in the opinion of the whole Court, and should be quashed.

With reference to the charges in respect of the annual statement, the accused was absent from Ontario continually from before it was adopted by the board until after it was sent to the Minister. There is no evidence that the accused made, prepared, or took any part whatever in the making or preparation of the annual statement, or that he ever used it, saw it, or had approved of or concurred in it, or had any knowledge whatever as to its contents. Nevertheless it was argued that he knew it was the duty of the board to prepare such a statement, to submit it to the shareholders at their annual meeting, and to send it to the Minister, and that therefore he was bound by the action of the board, and that the Court might infer guilt because he had not, in some way, manifested dissent. The accused was entitled to assume that the board would make a true, not a false, return, and unless he knew or had some reason to believe that it was false, no inference against him could be drawn from the mere fact that he did not, in some way, manifest dissent. It might, with equal force, be contended that Mr. Mitchell, one of the directors, a resident of England, who

never attended a board meeting, but apparently was absolutely innocent of any knowledge of the affairs of the bank, had also committed an offence against the Bank Act because he did not manifest dissent from the annual report.

I am of opinion that there are no circumstances warranting the inference of guilt on the part of the accused. The onus was on the Crown to prove guilt, and in this it has failed.

I therefore think the convictions in respect of the annual statement are bad, and must be quashed.

Having reached this conclusion, it is unnecessary for me to discuss the facts in further detail, but I think it proper to express my opinion as to the conduct of the accused in relation to the bank whilst he was one of its directors. The evidence shews that he joined the Board, not in his own interest, but in that of the bank, and throughout his whole connection with it his conduct was governed solely by consideration of the bank's best interests. He made no improper use of any of its funds for the benefit of himself or of any other person, or of any corporation in which he was interested.

When he joined the board, his own banking account and that of his firm were kept at another bank, and so they always remained, and he appears to have enjoyed with his own bank whatever banking facilities he desired. On a few odd occasions he borrowed some comparatively small sums from the bank, but they were all duly repaid, and the transactions were in the interests of the bank. There is nothing in the evidence to justify any charge against him of dishonourable or improper conduct. He seems to have believed in the integrity and capacity of the president and general manager, and to have relied upon the information (which later proved to be untrue) given by them to him as to the bank's position, and was thus misled. He had no reason to doubt the truthfulness of the president and manager, and therefore, though misled by them, he was guilty of no negligence.

Appeal allowed.

NOTE.—See the similar cases of *Rex v. Stewart* and *Rex v. Wood*, decided on the same day and by the same Court as the three above cases, and noted in 28 O.W.N. 391 and 394.

App. Div.

1925.

REN

v.

GOUGH.

Mullock.

C.J.O.

[APPELLATE DIVISION.]

1925.

REX V. WEST.

June 27.

Criminal Law—Rape—Trial—Conviction—Appeal—Criminal Code, sec. 1014 (13 & 14 Geo. V. ch. 41, sec. 9)—Trial Judge's Summing-up—Miscarriage of Justice—New Trial.

Upon appeal by the defendant from his conviction and sentence upon his trial for rape before a Judge and jury:—

Held, that the trial Judge has a right to ask leading questions, to endeavour to speed the trial, and even to tell counsel that he is wasting time; he also has the right to suggest that counsel waive their rights to address the jury: these are matters of discretion and good judgment, not entitling the Court to interfere unless of opinion that they resulted in a manifest injustice to the accused.

But in this case the majority of the Court was of opinion that the trial Judge had failed to direct the jury's attention to the evidence favourable to the prisoner, or failed to present the issues and evidence in such a way as to insure the jury's due appreciation of the value and effect of that evidence from the point of view of the prisoner, and thus failed to sum up to the jury in the manner required by the authorities; and, deeming that there had been a mistrial, directed a new trial.

Reference to sec. 1014 of the Criminal Code, as enacted by (1923) 13 & 14 Geo. V. ch. 41, sec. 9.

Review of the authorities.

Rex v. Hill (1911), 7 Cr. App. R. 1, *Rex v. Starkie* (1912), 16 Cr. App. R. 61, and *Rex v. Baugh* (1917), 38 O.L.R. 559, specially referred to.

APPEAL by the defendant from his conviction and sentence upon his trial for rape before RIDDELL, J., and a jury at the St. Catharines assizes. The defendant asked for a new trial.

June 1 and 2. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

D. F. Pepler, for the appellant, argued that the conviction was a miscarriage of justice because the learned trial Judge did not give the defendant full opportunity to bring out his defence, and the trial was rushed through with undue haste; that a new trial should be granted because of the discovery of new evidence; and that the sentence imposed upon the appellant was too severe, considering the fact that the jury had recommended mercy. Counsel also contended that the learned trial Judge did not sum up fairly for the prisoner, in that he did not present to the jury the defence view and the meaning and effect of the evidence in such a way as to assure their appreciation of its effect and importance: *Rex v. Baugh* (1917), 38 O.L.R. 559; *Rex v. Graves* (1912), 20 Can. Crim. Cas. 384.

F. P. Brennan, for the Crown, argued that the learned trial

Judge dealt fairly with the accused throughout. There was no miscarriage of justice. The Judge had the right to ask leading questions in order to bring out the facts, and had not gone outside his rights in any way. There was nothing in the record to shew that the trial was hurried. Then as to the argument that the learned trial Judge did not properly direct the jury, this point was not taken in the notice of appeal, and so was not properly before the Court.

App. Div.

1925.

 REX
v.

 WEST.

June 27. The judgment of the majority of the Court was (by direction of the Chief Justice) read by FERGUSON, J.A.:—The appellant's complaints as set out in his reasons for appeal are:—

"1. That the conviction was a miscarriage of justice in so far as the learned trial Judge did not give full opportunity to me to bring out my defence, and that he stopped, on several occasions, my counsel from the proper examination or cross-examination of witnesses, and my whole trial was rushed through with undue haste, considering the seriousness of the charge and the penalty therefor.

"2. That my conviction should be set aside and a new trial ordered, on the grounds that I have discovered new evidence to the effect that the complainant, Hattie Wilkins, laid the complaint against me not on account of any alleged rape taking place, which I deny, but because my co-partner in the alleged crime owed money to the complainant's father, and that she, Hattie Wilkins, had made up her mind to get two other men in the city of St. Catharines into the same trouble in the same manner, after which she intended to leave the vicinity.

"3. That my sentence of four years and ten lashes is too severe in view of the fact that the jury brought in a verdict of guilty with a recommendation for mercy.

"4. That my conviction and sentence were against law, evidence, and weight of evidence adduced at trial."

On the argument the appellant made the further complaint:—

That the learned trial Judge did not sum up fairly and in the manner required by law, in that he neglected to present to the jury the defence view and the meaning and effect of the evidence, or any of the evidence, supporting the defence, and did not analyse the evidence, or such of it as was favourable to the defence, in such a way as to assure the jury's appreciation of its effect and importance.

The grounds on which we may allow an appeal as set out in sec. 1014 of the Criminal Code, as enacted by (1923) 13 & 14 Geo. V. ch. 41, sec. 9, are:—

App. Div.
 1925.
 REX
 v.
 WEST.
 Ferguson,
 J.A.

“(a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

“(b) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law; or

“(c) that on any ground there was a miscarriage of justice; and

“(d) in any other case shall dismiss the appeal.”

Considering the words “on any ground there was a miscarriage of justice” as used in sec. 4 (1) of the Criminal Appeal Act as well as in para. (c) of sec. 1014, *supra*, Archbold, in the 26th edition of his work on Criminal Pleading, p. 338, says:—

“These general words in section 4 (1) of the Criminal Appeal Act cover cases where there has been a misdirection as to the evidence . . . or where the trial was conducted unfairly.”

For these propositions Archbold cites *Rex v. Hill* (1911), 1 Cr. App. R. 1; *Rex v. Crippen*, [1911] 1 K.B. 149; *Rex v. Howarth* (1918), 13 Cr. App. R. 99; and *Rex v. Ratcliffe* (1919), 14 Cr. App. R. 95.

None of these go as far as to say that the Court will interfere merely because the Judge has conducted the trial in an objectionable style or manner, or in a manner that the Court thinks open to criticism.

In the *Hill* case counsel made many complaints of the hostile attitude of the trial Judge and of his comments during the trial, and what seemed to him to be unfair statements in the summing up. In that case Lord Alverstone, delivering the judgment of the Court, said, among other things:—

“We will say at once that whoever the Judge may be, if it appears that his conduct of a case has led to a mistrial, we should interfere.”

This statement is followed by an analysis of the complaint of counsel that, owing to the hostile attitude of the trial Judge and his repeated suggestion that counsel should forgo his right to address the jury, counsel did forgo that right. Lord Alverstone points out that counsel was not deprived of the right by ruling, but voluntarily acceded to a persistent repeated suggestion of the Judge, and that consequently this ground of complaint failed. On the other complaints, which are largely of the nature of the complaints in this case, Lord Alverstone said:—

“We are not here to deal with questions of style and manner.”

We do not doubt that, objectionable as it may be, the trial Judge has a right to ask leading questions, also to endeavour to

speed the trial, and even to tell counsel that he is wasting time, and that he also has the right to suggest, as he did in this trial, that counsel waive their rights to address the jury. These, we think, are matters of discretion and good judgment, not entitling us to interfere unless we are of opinion that they resulted in a manifest injustice being done to the accused. In the *Crippen* case, Darling, J., delivering the judgment of the Court, at p. 157, said:—

“It does not appear to have been laid down in any of the authorities that if the Judge at the trial exercises his discretion in a manner different from that in which the Court of Appeal would have exercised it, that is of itself a sufficient ground for granting a new trial.”

But in a later case of *Rex v. Starkie* (1921), 16 Cr. App. R. 61, the Lord Chief Justice said (p. 66):—

“The rule that a judicial discretion cannot be reviewed must be qualified by some such words as ‘unless a manifest injustice is disclosed.’ . . . Beyond that this Court has no power; otherwise there would be no ‘discretion.’ So it is implied in *Crippen*.”

That leaves for our consideration the appellant's complaint in reference to the summing up. The duty of a Judge in summing up has been considered in many cases, and several of the English cases were reviewed and considered by this Court in *Rex v. Baugh*, 38 O.L.R. 559. In that case the Court seems to have been of the opinion that, while the trial Judge is not required in a summing up to review all the evidence in detail, it is necessary that he makes certain that the theory of the defence is fully put to and understood by the jury, and that the evidence in support of the defence is also presented to the jury as carefully as the case for the prosecution and in such a way as to make sure that the jury understand and appreciate its meaning and effect. This, we think, is the meaning and effect of the following additional English cases:—

Rex v. Warner (1908), 1 Cr. App. R. 227, 228—Walton, J.: “I think it is a serious flaw in a summing up if it does not put the case for the prisoner to the jury as carefully as the case for the prosecution.”

Rex v. Keating (1909), 2 Cr. App. R. 61—Walton, J.: “It is most important that the evidence for the prisoner should be put as carefully as that for the prosecution.”

Rex v. Hadijah Ahmed Caroubi (1912), 7 Cr. App. R. 149, 153—Hamilton, J.: “The defence was not left to the jury in a way in which they could do it justice, and we are therefore of the opinion that the conviction must be quashed.”

App. Div.

1925.

REX

v.

WEST.

Ferguson,

J.A.

App. Div.

1925.

REX
v.

WEST.

Ferguson,
J.A.

Rex v. Wilson (1913), 9 Cr. App. R. 124, 126—Lush, J.: “The real case that the appellant made out was not put to them.”

Rex v. Totty (1914), 10 Cr. App. R. 78, 79—Reading, L.C.J.: “A Judge should take care to point out all that there is to be said for the defence, especially when the prisoner is undefended by counsel.”

In this case, on the issue of drunkenness and consequent lack of capacity to resist or consent, the learned trial Judge failed to direct the jury’s attention to the amount of liquor consumed by the complainant, the short time that elapsed between the drinking and the alleged offence, the evidence that the complainant frequently drank wine, the ability of the complainant to recall and restate in detail everything that was said and done before and during the alleged offence. The jury may have been of the opinion that the complainant was not so drunk as to be unable to resist or to consent, but that she did resist and did not consent. On that issue it was most important from the point of view of the appellant that the attention of the jury should be drawn to the evidence of the doctor as to her physical condition and the evidence of her previous manner of living and conducting herself. This evidence was not referred to by the trial Judge. In fact he refused when requested to do so, and expressed the opinion that the evidence of the doctor was of no value, and that the jury would have to take the story of the other witnesses for it. The value and effect of the evidence was for the jury: *Rex v. Swityk* (1925), 43 Can. Crim. Cas. 245.

The case is near to the line, but the majority of the Court is of opinion that the learned Judge failed to direct the jury’s attention to the evidence favourable to the prisoner, or failed to present the issues and evidence in such a way as to insure the jury’s due appreciation of the value and effect of that evidence from the point of view of the prisoner, and thus failed to sum up to the jury in the manner required by the authorities, and that in all the circumstances there has been a mistrial, and that the ends of justice will be best served by setting aside the conviction and directing a new trial.

Order for a new trial.

[APPELLATE DIVISION.]

CURRY V. FARRELL.

1924.

Oct. 29.

1925.

June 27.

Landlord and Tenant—Lease of Premises for Coal-yard—Right of Tenant to Use of Railway Siding Owned by Railway Company—Necessity for Consent of Company—Duty of Landlord to Procure—Breach—Damages—Rent—Eviction—Continuance of Tenancy.

The plaintiff sued his landlord for damages sustained by being deprived of the use of a railway siding which was an essential adjunct to his (the plaintiff's) coal-business carried on upon the demised premises. The lease contained no words including the siding as part of the demised premises. The siding was owned by a railway company, and was built for the use of the defendant, who paid part of the cost, which was (according to the agreement between them) to be repaid to the defendant by a rate upon every car shipped in or out of the siding loaded with the defendant's goods. The consent in writing of the railway company to any assignment was required by the agreement. The defendant could not demise the siding; but he licensed the use of it by the plaintiff for the first year and part of the second of the tenancy, receiving consideration for it in the rent. The use was terminated before the end of the second year, that year's rent having been paid in advance:—

Held, by MIDDLETON, J.A., the trial Judge, that the defendant was liable to the plaintiff in damages for bringing about such a condition of affairs as to cause the railway company to refuse to permit the further use of the siding.

Held, on appeal, that the use of the siding was essential to the beneficial use of the demised premises as a coal-yard; and, if any document was needed to manifest the railway company's consent, the defendant was bound to procure it; his license, to which he was bound to get the railway company's consent, was granted for valuable consideration, and was not revocable while the lease or the renewal lease was in operation.

Heller v. Niagara Racing Association (1924), 56 O.L.R. 355, followed.

The defendant neglected his duty to get the necessary consent, the railway company refused to place cars on the siding, and the defendant's neglect worked injury to the plaintiff in his business.

Damages from inconvenience, extra expense, and loss of business, followed directly from the breach of the legal obligation of the defendant.

There was no proof certain enough to warrant an increase in the damages assessed by the trial Judge.

Held, also, that the refusal to permit the use of the siding destroyed the economic value of what was left as a locus for a coal distributing business, and the plaintiff was justified in abandoning it.

The act which brought this about was equivalent to an eviction by the landlord; and the consequence was a suspension of the rent while the exclusion lasted, but not the termination of the tenancy.

Judgment of MIDDLETON, J.A., varied.

ACTION by a tenant against his landlord for cancellation of his lease and damages. Counterclaim by the landlord for rent.

The action and counterclaim were tried by MIDDLETON, J.A., without a jury, at a Toronto sittings.

E. M. Hand and *J. D. O'Neill*, for the plaintiff.

F. C. Carter and *R. L. Kellock*, for the defendant.

Middleton,
J.A.
1924.
CURRY
v.
FARRELL.

October 29. MIDDLETON, J.A.:—This case was tried before me some time since, and has been standing for argument in the hope of some settlement between the parties. The argument has now been filed.

I agree with the plaintiff that under the tenancy it was intended that he should have the use of the railway siding for the purpose of handling coal, and I further agree with him that the defendant was instrumental in bringing about such a condition of affairs as to cause the railway company to refuse the use of the siding. I do not think that this terminated the tenancy, but the plaintiff is entitled to damages for the comparatively short time for which he was prevented from having the use of the siding. The difficulty which I have is in ascertaining the damages which the plaintiff has actually sustained. Instead of attempting to carry on his business elsewhere or seeking to charge the plaintiff with the extra cost of loading coal arising from his inability to use the siding, he apparently in a somewhat helpless and aimless way threw up his hands and discontinued business, and I do not think that this was the reasonable outcome of what the defendant did, but that the real fact is that the coal business was on the down grade, and the unfortunate occurrences were made the occasion of the discontinuance of the business.

I have come to the conclusion that I should award the plaintiff substantial damages, although I find myself entirely at a loss in endeavouring to apply any reasonable measure of damages in his favour. I think, however, that, sitting as a jury in the case, I should allow him \$500. On the other hand, the plaintiff remains liable for the rent which is sought to be recovered by the counterclaim; and, therefore, I give judgment for the plaintiff for the amount that I have named, with costs of suit upon the Supreme Court scale, and for the defendant for the amount of rent due as shewn by his counterclaim, together with the costs of the counterclaim, these to be set off one against the other *pro tanto*.

The plaintiff appealed from the judgment of MIDDLETON, J.A.

January 28 and February 11 and 12. The appeal was heard by MULOCK, C.J.O., HODGINS, FERGUSON, and SMITH, J.J.A.

Hand and O'Neill, for the appellant, contended that the damages should be increased and the counterclaim dismissed. They referred to *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (1884), 9 App. Cas. 434, *per* Lord Blackburn, at p. 443; *Frost v. Knight* (1872), L.R. 7 Ex. 111; *Hochster v. De la Tour* (1853), 2 E. & B.

678; *Michael v. Hart & Co.*, [1902] 1 K.B. 482; *Hart & Co. v. Michael* (1903), 89 L.T.R. 422; *Price v. Wilkins* (1888), 58 L.T.R. 680; *Wood v. Prestwich* (1911), 104 L.T.R. 388; *Oaten v. Stanley* (1893), 19 Vict. L.R. 553; *Town of Grand'mère v. L'Hydraulique de Grand'mère* (1908), Q.R. 17 K.B. 83; *Sabapathy v. Vanmahalinga*, [1915] I.L.R. 38 Mad. 959.

App. Div.
1925.
CURRY
v.
FARRELL.

Carter, for the defendant, respondent, contended that the judgment below was right. The principle of the decisions in *Hochster v. De La Tour* and *Frost v. Knight* applied only to wholly executory contracts and not to one such as the present lease. Reference to *Bain v. Fothergill* (1874), L.R. 7 H.L. 158.

June 27. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the plaintiff from judgment of Middleton, J.A., for \$500 damages, in favour of the plaintiff. The action is by a tenant against his landlord for damages sustained, as the tenant alleged, by being deprived of the use of a railway siding which was an essential adjunct to his coal-business and included in the tenancy. The learned Judge says in his judgment:—

“I agree with the plaintiff that under the tenancy it was intended that he should have the use of the railway siding for the purpose of handling coal, and I further agree with him that the defendant was instrumental in bringing about such a condition of affairs as to cause the railway company to refuse the use of the siding. I do not think that this terminated the tenancy.”

The appeal is directed to increasing the damages and to having the counterclaim for rent dismissed. The questions involved are somewhat nice and were well argued.

The lease and its renewal contain no words including the siding as part of the demised premises. This is not important if in fact the property, or its reasonable use, needs such an appurtenance: *Denne v. Light* (1857), 3 Jur. 627; and the lessee could have resisted specific performance had he not got the use of the siding: *Dykes v. Blake* (1838), 4 Bing, N.C. 463. The siding is owned by the Canadian National Railway Company, built for the use, on certain terms, of the defendant, who paid part of the cost, some \$2,355.29. This part of the cost was to be repaid to the defendant at the rate of \$2 per car “for every car shipped in or out of the said siding fully loaded with the goods and materials of the second party” (i.e., Farrell, the landlord).

Another clause requires the consent of the railway company to any assignment, and is as follows:—

“13. The second party shall not assign or transfer any right

App. Div.

1925.

CURRY
v.

FARRELL.

Hodgins,
J.A.

or privilege upon or over the said siding to any person or persons whomsoever without the written consent of an executive official of the Grand Trunk, and except as hereinafter provided the said siding shall be used exclusively for the receipt from and delivery of freight to the second party in connection with the business carried on on or about the said premises."

While the written leases only describe the land to be occupied by the tenant, it appears that the advertisement of the landlord which attracted him was "space to rent with railway siding," and it is undoubted that the negotiations and contract proceeded and were concluded on that basis. Indeed the rent was fixed with the idea of compensating the defendant for the expenditure he had been put to in getting the siding put in. The defendant had been in the coal business and understood the necessity for the siding in the profitable operation of that yard.

The leases each contain the following clause:—

"Provided that the lessee will upon request supply the lessor with a true and correct statement of the numbers of cars received and shipped by him from the above named siding and the dates on which the same were shipped or received."

In a memorandum, a copy of which is produced, shewing what the defendant agreed to do to the premises to fit them for the coal business, occurs the following: "Plank outside next railway siding to height of 10'." This and other matters mentioned in the memorandum were completed by the defendant after the plaintiff took possession, and resulted in enabling the plaintiff to shoot the coal from the cars directly into his bins. Rent was paid under the leases in advance up to the 15th January, 1924. The beneficial use of the siding was terminated some time in December, 1923. It belonged to the railway company, and was upon part of its lands, and could not be demised by the defendant. When the plaintiff saw that the leases did not mention it, he spoke of it to the defendant, who replied that they both knew he had the use of the siding. It was clearly essential to the beneficial intended use of the demised premises as a coal-yard to the defendant's knowledge, and while he could not demise it he was in a position to license or permit its use to the plaintiff. He did so for the first year and part of the second, receiving rent for it as part of the tenancy. If any document was needed to manifest the railway company's consent, he was bound to procure it. But his license, to which he was bound to get the railway company's consent, was granted for valuable consideration, and was not, under the circumstances, revocable while the leases were in operation: *Heller v. Niagara Racing Association* (1924), 56 O.L.R. 355.

The difficulty first arose about November, 1923. The landlord, on the 21st of that month, sent to the railway company a consent to the use of the siding by the tenant. The railway company sent for signature another and somewhat different one. This the landlord refused to sign or send. In 1923, between the 7th and 15th December, the tenant learned from a dealer, from whom he was buying coal, that the railway company would not deliver this dealer's coal to him at this siding. The landlord, when told of this, said he had declined to sign the letter which the railway company wanted, and asked the tenant to send the cars in his name and he would then get the \$2 per car. This the tenant declined to do. Nothing further was done by the defendant to solve the difficulty, and he never got the formal assent of the railway company—though knowing of its attitude and the result to the plaintiff of the stoppage of his privilege. The embargo lasted till the 15th March, 1924. The loss of the use by the tenant of the siding was thus continued for three months, until the 15th March, 1924, while the lease continued beyond that date till the 15th October, 1924. While the action of the landlord was not perhaps dictated by any improper motive, it is perfectly clear that there was entire neglect on his part of his duty to get the necessary consent, and that neglect worked injury to the plaintiff in his business. The defendant should have made every effort to persuade the railway company to recede from its position.

The railway company's officials here were advised by the legal department in Montreal that they had been wrong in not acting on the letter which the landlord had signed in November, 1923, which, coupled with the tenant's application at the same time, completed the formal documents required by the railway company. This advice was not given till the 11th March, 1924.

The learned trial Judge entertained the view that the defendant was to blame for bringing about the railway company's refusal to deliver cars to the plaintiff on the siding. But the statement of Raymond makes it evident, in my judgment, that the railway company were wrong throughout in not acting upon the letters originally sent them in November, 1923. The questions remain, however, as to the effect of the non-procurement by the defendant of the railway company's consent pursuant to his agreement with them, and the rights of the plaintiff consequent upon his exclusion from the use of the siding.

As to damages, the following evidence of the tenant is important. (Mr. Holmes, mentioned therein, is the coal clerk of the Canadian National Railway, and what he said was, according to his evidence, due to the orders of his superior officer.)

App. Div.

1925.

CURRY
v.

FARRELL.

Hodgins,
J.A.

App. Div.

1925.

CURRY
v.

FARRELL.

Hodgins,
J.A.

"Mr. Carter: Q. In your examination for discovery you said that there were three people in the railway service who told you that they would not put cars there, and you refused to give their names on your solicitor's undertaking to produce them at the trial and call them as witnesses. Who were those three men? A. They are here now.

"Q. I want their names? A. One is Mr. Holmes, and Mr. Graves and Mr. Raymond.

"Q. What did Mr. Holmes say to you? A. He said he would not put any cars down there till Mr. Farrell would sign the letter. It was all the same thing. And Mr. Graves, he said practically the same thing. Mr. Graves was a checker down there. He told us different times if coal came in, and I wanted it in a hurry, he would try and get it through for us. We went to him then for some assistance. He said he couldn't do nothing. Always the same answer, that the cars were stopped until the letter was signed. . . .

"His Lordship: Did you quit your business, or did you get your coal delivery elsewhere? A. We got some in on another siding, but it cost so much more to handle it that there was no more money in it, and we didn't bother any more.

"Mr. Carter: Q. You quit your business? A. Yes, sold out what coal we did have.

"Q. When you were informed on the 15th March that they would resume the service, you did not try to carry on from then? A. We lost pretty nearly all our business.

"Q. Didn't you do business from another yard? A. We did a little business from another yard.

"Q. All the time. A. No, not all the time.

"Q. How long? A. Another man had some coal to sell, and I bought it from him, and delivered the coal from it.

"Q. You have not tried to do any business from your own yard since the 15th March? A. No, we have to build our business all up again.

"Q. You have not tried to build it up, have you? A. No, I did not know how long I was going to be there."

The right to damages depends on the breach of the defendant's obligation to get the consent of the railway company and for the action of the railway company consequent on his default. I think the plaintiff is entitled to some damages: *Hilton v. Tipper* (1868), 18 L.T.R. 626. While it is of course the duty of the plaintiff to mitigate his loss if possible, his doing so in the only way indicated by the defendant would, if he had continued his

business, have caused a much greater loss than the learned trial Judge has allowed him on the basis of his abandoning the attempt. And this duty is mitigation, and not an increase of the loss, and is always limited by the consideration that its performance shall be reasonable under the circumstances: *La Blanche v. London and North Western Railway Co.* (1876), 34 L.T.R. 667.

The railway company's refusal to place cars on the siding, even if wrongful, does not relieve the defendant, so far as the plaintiff is concerned, from the results which followed, which have also a bearing upon the subject of the counterclaim. The damages suffered from inconvenience, extra expense, and loss of business, follow directly from the breach of the legal obligation of the defendant arising out of his arrangement with the plaintiff. It was his business to get the railway company's consent under his agreement with the plaintiff (see Woodfall on Landlord and Tenant, 20th ed., pp. 300 and 805); and, if the landlord were judged only by the test of whether he made a reasonable effort to get it (*In re Anglo-Russian Merchant Traders and John Batt & Co. (London)*, [1917] 2 K.B. 679), the result would be the same, as he made no effort at all to facilitate a settlement with the railway company or procure their agreement. This breach resulted in putting an end to the plaintiff's business, the wrongful acts of the holder of the superior title being evidence shewing how the damages arise.

In view of the practical abandonment by the tenant of his business there and upon a perusal of the evidence, I do not see any proof which is certain enough, as to profits, loss or inconvenience, to warrant an increase in the damages allowed by the learned trial Judge.

There remains the question of the rent. What occurred would have been eviction by title paramount had the siding been part of the demised premises, for it was essential to the business efficacy of the contract to the knowledge and within the intent of the parties. What occurred was not a mere trespass, though depriving the lessee of part of the demised premises, as in *Hunt v. Cope* (1775), Cowp. 242. It was equivalent to what is called, in that case, eviction or expulsion. Recourse cannot be had to a covenant for quiet enjoyment, as there is none here applicable, and, if there were, the landlord did not interfere nor did the railway company hold under him. The doctrine of "frustration" is not applicable in a case of this nature: *Whitehall v. Ettlinger*, [1920] 1 K.B. 680. The refusal to permit the use of the siding, as I have pointed out, reacted on the situation in such a way as to destroy the economic value of what was left as a locus for a coal distributing business, and I think the plaintiff was justified in abandoning it.

App. Div.

1925.

CURRY
v.

FARRELL.

Hodgins.
J.A.

App. Div.

1925.

CURRY
v.
FARRELL.
Hodgins,
J.A.

The act which brought this about amounted, in my view, to the equivalent of an eviction by the landlord, for there is no valid distinction in point of law, as to the consequences, between the tortious act of a landlord himself in evicting and a tortious act of the landlord, negligence, which brings about the eviction by a paramount title. The consequence in either case is a suspension of the rent while the exclusion lasts, but the tenancy is not ended.

Lord Atkinson, in *Matthey v. Curling*, [1922] 2 A.C. 180, at p. 235, quotes with approval the observations of Coltman, J., in *Morrison v. Chadwick* (1849), 7 C.B. 266, at p. 283:—

“It may be urged, that the landlord may have evicted the tenant from the possession of a part of the demised premises, the possession of which part was the main inducement to him to enter into the covenants of the lease, and therefore that he ought not any longer to be bound by them. But it is to be borne in mind, that, in addition to the suspension of the rent, the lessee may maintain his action against the lessor for the eviction; by which, it is to be presumed that he will obtain satisfaction for any inconvenience and loss which he may suffer.”

In this case the rent was, to my mind, irrecoverable during the three months while the embargo was in force, but upon its removal the tenant became again liable upon his covenant. The tenant was, besides the suspension of the rent, entitled to recover damages for his inconvenience and loss.

Paragraph 3 in the judgment on appeal should be varied by striking out the figures \$1,000 (this being rent for 5 months) and inserting in lieu thereof the figures \$400 (for the 2 months after the 15th March, 1924).

Otherwise the judgment will be undisturbed. No costs of this appeal can be given to either party, as the plaintiff's success is only partial.

Judgment below varied.

[APPELLATE DIVISION.]

1925.

CAMPBELL FLOUR MILLS CO. LTD. v. CITY OF PETERBOROUGH.

June 27.

Municipal Corporations — Resolution of City Council — Inquiry into Alleged Mistakes Made in Charges for Electrical Power by Public Utilities Commission — Separate Statutory Body — Part of Public Business of Municipality — Municipal Act, R.S.O. 1914, ch. 192, sec. 248 — Water Commissioners — General and Special Statutes.

A municipal corporation has no right to initiate an inquiry before a County Court Judge under sec. 248 of the Municipal Act, R.S.O. 1914,

ch. 192, concerning a matter which is not under the control of the municipal council, but is handed over to another statutory body to manage.

By resolution of the Council of the City of Peterborough, the Judge of the County Court of the County of Peterborough was requested to inquire into and report upon the apparent failure of the Peterborough Utilities Commission to charge the plaintiffs, a milling company, for the full amount of the electrical power that was alleged to have been used by their mill, in the city, for a period of more than two years:—

Held, that the matter sought to be investigated was no part of the public business of the municipality, within the meaning of sec. 248, but was solely that of the Water Commission of Peterborough as a Public Utilities Commission.

Reference to the following Ontario statutes: Municipal Waterworks Act, R.S.O. 1897, ch. 235, sec. 40; an Act to provide for the Transmission of Electrical Power to Municipalities, 6 Edw. VII. ch. 15; two Acts respecting the City of Peterborough, 7 Edw. VII. ch. 82 and 4 Geo. V. ch. 87; the Power Commission Act, 1913, 3 & 4 Geo. V. ch. 12, sec. 5; the Public Utilities Act, R.S.O. 1914, ch. 204, sec. 35; and the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, secs. 8, 9, 10.

Review of the decided cases.

Re City of Berlin and County Judge of the County of Waterloo (1914), 33 O.L.R. 73, specially referred to.

Young v. Town of Gravenhurst (1910-11), 22 O.L.R. 291, 24 O.L.R. 467, distinguished.

APPEALS by the defendants from the judgment of MIDDLETON, J.A., in the Weekly Court, Toronto, 2nd February, 1925, upon a motion by the plaintiffs for an interim injunction, turned into a motion for judgment, perpetually restraining the defendants the Municipal Corporation of the City of Peterborough from taking any proceedings under, and the defendant Huycke, the Judge of the County Court of the County of Peterborough, from holding any inquiry under, a resolution of the city council requesting the defendant Huycke to inquire into and report upon the failure of the defendants the Peterborough Utilities Commission to charge the plaintiffs proper amounts for electric power supplied by the commission to the plaintiffs from March, 1919, to December, 1921.

March 23 and 24. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

J. Wearing, for the appellants the city corporation.

R. R. Hall, K.C., for the appellant Huycke.

Christopher C. Robinson, K.C., for the appellants the commission.

Wallace Nesbitt, K.C., for the plaintiffs, respondents.

The following statutes and cases were referred to: The Municipal Act, R.S.O. 1914, ch. 192, sec. 248; the Public Utilities Act,

1925.

CAMPBELL
FLOUR
MILLS Co
LTD.
v.
CITY OF
PETER-
BOROUGH.

App. Div. R.S.O. 1914, ch. 204, secs. 26-45; the Power Commission Act, 1925. R.S.O. 1914, ch. 39, secs. 18-24; An Act respecting the City of Peterborough, 7 Edw. VII. ch. 82, secs. 1, 2, 6; the Public Inquiries Amendment Act, 1921, 11 Geo. V. ch. 4; the Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, secs. 8, 9, 10, 348; *Re City of Berlin and County Judge of the County of Waterloo* (1914), 33 O.L.R. 73; *Young v. Town of Gravenhurst* (1910-11), 22 O.L.R. 291, 24 O.L.R. 467; *Scott v. Hydro-Electric Commission of City of Hamilton* (1914), 7 O.W.N. 385; *Wilson v. Riddell* (1921), 20 O.W.N. 24; *In re Godson and City of Toronto* (1890), 16 A.R. 452, 18 Can. S.C.R. 36; *Sanitary Commissioners of Gibraltar v. Orfila* (1890), 15 App. Cas. 400; Beal's Cardinal Rules of Legal Interpretation, 3rd ed., p. 439; *In re Dudley Corporation* (1881), 8 Q.B.D. 86; *Chambers v. Winchester* (1907), 15 O.L.R. 316; *Hedley v. Bates* (1880), 13 Ch. D. 498; *North London Railway Co. v. Great Northern Railway Co.* (1883), 11 Q.B.D. 30, 37.

June 27. The judgment of the Court was read by HODGINS, J.A.:—The sole point involved in this appeal is the right of the corporation to initiate an inquiry before the County Court Judge under R.S.O. 1914, ch. 192, sec. 248, in a matter which, under certain legislation, is not under the direct control of the city council, but is handed over to another body to manage.

That section provides that the County Court Judge shall make an inquiry when the council pass a resolution requesting him to "investigate any matter relating to a supposed malfeasance or breach of trust . . . or to inquire into or concerning any matter connected with the good government of the municipality, or the conduct of any part of its public business."

With the importance or the reverse of the matter to be investigated we are not concerned. But it is necessary to understand it so far as to ascertain whether it comes within the scope of that part of the section I have quoted, which both sides agree contains the only words which could cover this case. I shall therefore shortly state it.

The charge is an alleged mistake in billing the plaintiffs for power in 1919, 1920, and 1921. Up to February, 1919, the plaintiffs, who are millers, were on a flat rate. Then a meter was installed. They were billed each quarter for what the meter shewed, and they have paid all their bills. Alderman Meyers, also a miller in Peterborough, insisted that there must be a mistake in the amounts charged, alleging that, if his own bills for power were correct, the plaintiffs were not paying adequately for their busi-

ness requirements. He formulated the charge before the city council, who passed the resolution for this inquiry. In the resolution the subject-matter is stated:—

“Be it therefore resolved that under the provisions of section 248 of the Municipal Act his Honour E. C. S. Huycke, Esquire, Judge of the County Court of the County of Peterborough, be requested to inquire into and report upon the apparent failure of the Peterborough Utilities Commission to charge the Campbell Flour Mills Company Limited for the full amount of the electrical power that would appear to have been used by its said mill situated within this city from the month of March, 1919, to the month of December, 1921, according to the said report of the Hydro-Electric Power Commission of Ontario.”

This matter has been openly discussed with much animation for some time, and has already been investigated twice: once in a public inquiry by the Public Utilities Commission of Peterborough, and once by the Ontario Hydro-Electric Power Commission. The Utilities Commission buys power from the Power Commission and distributes it, and bills are rendered to the plaintiffs by the Utilities Commission, to whom they are payable. These bills are, therefore, a business matter entirely within the province of that commission, as it both fixes and collects the rates. It is so treated in the resolution. It may be of some value, however, to see just where these two investigations have left the question. The city council in the preamble to their resolution deal with each of these inquiries in this way. As to the Power Commission they say that its report shews “that one-third h.p. per barrel is the ordinary milling practice in power installation and that the said mill proper, apart from the feed-mill, required 250 h.p. to 270 h.p. to turn it over after the full feed is on.”

This reference is not accurate. On examination of the report, I find that the words after “installation” do not appear in it.

As to the Utilities Commission, the council say that its books “shew that from March, 1919, until December, 1921, the Campbell Flour Mills Company Limited, with reference to the said mill, was charged for electrical power used by it in its operation not more than an average less than 75 h.p. maximum demand.”

This is evidently a deduction from the figures in the books. The conclusion is that neither of the reports “elucidates the mystery.”

The matter stated is thus reduced either to the inaccuracy of the records shewn by the meters installed by the Utilities Commission, or to the incorrectness of the bills sent out by it. The

App. Div.

1925.

CAMPBELL
FLOUR
MILLS Co
LTD.
v.

CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

App. Div.
1925.

CAMPBELL
FLOUR
MILLS CO.
LTD.
v.

CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

plaintiffs' contract with the Utilities Commission authorises that body to install and repair meters or other measuring devices in order to fix the basis of the billing, and the Utilities Commission did so and are entirely satisfied with the results. The evidence given in the public inquiry held by the Utilities Commission may be briefly summarised. Fiske, manager and resident engineer of the commission, who had 10 years' previous experience in supervision and testing of the meters and electrical equipment of the Quaker Oats Company in Peterborough, stated that when the plaintiffs' flat rate contract ended in February, 1919, and a meter was put in, it was tested by the Government Department before being installed, and thereafter periodically by the Utilities meter staff. Another satisfactory Government test was made in February, 1922. In July, 1923, the meter was destroyed by lightning and a new one was supplied after a Government test. Its operation shewed records corresponding with those of the old meter, thus indicating that that meter had been accurate. With regard to the fluctuating results shewn from time to time, his explanation is shortly as follows. In 1919 the Campbell mill was "pretty slack"—all that year. The mill was then so designed that it could be "split in half," i.e., so that only half would operate; in 1920 it was slack and on part time, and was closed down for 13 weeks in June, July, and August, only running 235 days in that year. It was shut down in December, 1921, until about the end of 1922. During these periods the mill was overhauled, and new machinery installed which required the mill to be operated as a unit, not split as before. The chopper and elevator could be and were run separately during the time when the mill was not being used. The mill began to operate again in December, 1922, the new machinery having then been installed. The additional horse power required by the new machinery was calculated, and that amount, added to the horse power indicated by the earlier and later meter readings, corresponded with the total shewn after the new installation. Fiske says the meters are right, and he is satisfied that they shewed throughout correctly what the plaintiffs' concern used. It appears that the meter is situated outside the mill and 90 feet from it and at a height of about 30 feet above the ground, on a pole, and that to tamper secretly with it would be both impossible and dangerous, owing to the wires carrying 2,200 volts. In these statements he is corroborated by the foremen of both the meter department and the construction and operating department.

After this inquiry, the Hydro-Electric Power Commission held

another investigation. In their report the following statements are made:—

“The statement has been made that it is impossible to operate the mill with the demands shewn from March, 1919, to December, 1921. There is no criticism of the conditions during 1922, when it is admitted the flour mill was shut down for alterations and additional machinery installed, which is indicated by the increased demands in November, 1922, and since that time.

“We have examined the records of the Peterborough Utilities Commission from the meter reader’s card, and, except for some very small arithmetical errors which do not affect the result, everything is correct. . . .

“In conclusion we can find nothing to indicate that the meters were inaccurate, and it is our considered opinion that the power supplied to the Campbell Milling Company during the period from January, 1919, to December, 1923, was correctly measured and correctly billed.”

This report also approved the accuracy of the meters in use from 1919 to 1922.

This all points to the fact that, if anything is wrong, the meter or its readings or the bills founded on them must be at fault. The subpœna served on the plaintiffs, on which they founded their application for an injunction, indicates that the desired scope of the inquiry is to be much wider. Indeed it may be described as oppressive, as it comprehends 1918 (a year before the “mystery” begins) and 1922, when the mill was shut down, also 1923 and 1924, while none of these years are covered by the resolution nor is any charge suggested involving them. The subpœna requires production by the plaintiffs of:—

“2. All records or writings shewing the quantity of grain ground or milled daily, weekly, monthly, and yearly at the said city of Peterborough, by the said companies or either of them, during each of the years 1918 and 1924 inclusive.

“3. All records or writings shewing the quantity of flour, chop, and other products produced, manufactured, mixed, or blended, daily, weekly, monthly, and yearly, at the said city of Peterborough, by the said companies or either of them, during the years 1918 to 1924 inclusive.

“4. All books, papers, documents, freight bills, invoices and other writings which contain any entry in any way relating to grain, flour, chop, or other products received by the said companies or either of them at the said city of Peterborough during the years 1918 to 1924 inclusive.

App. Div.

1925.

CAMPBELL
FLOUR
MILLS Co.
LTD.

v.
CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

App. Div.

1925.

CAMPBELL
FLOUR
MILLS CO.
LTD.
v.

CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

“ 5. All books, papers, documents, receipts by railway customers and others, which contain any entry in any way relating to sales or shipments of grain, flour, chop, and other mill products, by the said companies or either of them, from the plant of the said companies or either of them, at the city of Peterborough, during the years 1918 and 1924 inclusive.

“ 6. All balance-sheets shewing assets and liabilities and trading statements shewing the usual receipts and expenditures of the said companies or either of them during the years 1919 to 1924 inclusive in respect of the business carried on by the said companies or either of them at the said city of Peterborough and the books and original records of the said companies and each of them from which said balance-sheets and trading statements are compiled or may be verified.

“ 7. Copies of all returns made by the said companies or either of them to the Dominion Bureau of Statistics during the years 1918 to 1924 inclusive respecting the business carried on by the said companies or either of them at the said city of Peterborough.

“ 8. Copies of all returns made by the said companies or either of them to the Workmen's Compensation Board during the years 1918 to 1924 inclusive respecting the business carried on by the said companies or either of them at the said city of Peterborough.

“ 9. All books, invoices, and other documents in any way shewing the purchase and installation of new machinery and alterations made to the plant of the said companies or either of them at the said city of Peterborough and all plans and drawings shewing the said companies' plant at Peterborough during the years 1918 to 1924 inclusive.

“ 10. And generally all cash-books, journals, ledgers, invoices, copies of invoices, freight bills, copies of freight bills, receipts, vouchers, fire insurance policies, purchase records, production records, sales records, and wage and salary records, and other paper writings, which may or might directly or indirectly or by inference or otherwise shew the quantity of horse power used or consumed by the said companies or either of them at the said city of Peterborough during each and every day and month of each and every year from 1918 to 1924 inclusive.

“ 11. All inventories shewing in detail the stock in trade of said companies or either of them at the city of Peterborough made from time to time during the years 1918 to 1924 inclusive.

“ 12. All pay-rolls shewing the name of each employee of the said companies or either of them, the amount paid to each employee from time to time, and particularly shewing the dates of

his employment from time to time during the years 1918 to 1924 inclusive."

While the discretion of the Judge, if duly authorised to hold the inquiry by a resolution within the terms of the statute, as to the relevant evidence he requires, is not one with which we can or desire to interfere, it seems evident from this subpoena that there is much ground for the plaintiffs contending that the "mystery" to be elucidated is not confined to what must form the real matter to be investigated, nor to the periods of time which it covers, but involves an inquiry into their business, assets, liabilities, wages, etc., which would be useful to a business rival.

Turning to the real question to be decided, it is well-known that inquiries under this section have in some instances been attempted, occasionally with success, regarding matters under the control of independent bodies, such as Boards of Health, Public School Boards, Boards of Education, and Police Commissions. There are at present in Toronto, in addition to those just named, such bodies as the Toronto Transportation Commission, the Toronto Hydro-Electric Commission, the Board of the Canadian National Exhibition, and the Harbour Commission, and no doubt similar bodies exist elsewhere. The question is, therefore, of some widespread interest.

No one can doubt that in one or other direction these bodies have to do with matters in which the people of the municipality have a lively and perhaps an important interest, and that in that way business managed by these bodies is of real concern to them. It is urged that, as the Corporation of Peterborough is by statute entitled to any surplus resulting from the operations of the business managed and controlled by the Water Commissioners of Peterborough, it follows naturally that the business must be that of the corporation and so within the section, but it is difficult to regard that fact as an exact test in this matter, for two reasons. It ignores the object of setting up an authority, different from the council, which, under the statute, represents the people of the municipality, which authority is elected by and is responsible to the same constituency, to deal with this particular enterprise. It must be clear to every one that the Legislature has from time to time vested in independently elected or appointed bodies various parts of what was originally the business of the municipality, and has specially favoured in that respect the segregation of what are called public utilities. In particular the management and control of electrical energy has generally been placed in the hands of local commissions on account of its technical character. And this has been done

App. Div.

1925.

CAMPBELL
FLOUR
MILLS CO
LTD.
v.
CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

App. Div.

1925.

CAMPBELL

FLOUR

MILLS CO.

LTD.

v.

CITY OF

PETER-
BOROUGH.

Hodgins,

J.A.

to establish contact between these bodies and the Ontario Power Commission, so that the production and distribution of power may be kept up to a proper and scientific standard, a thing hardly possible if they were managed as only one of many municipal activities. But another reason is that the argument is manifestly too wide in its scope, for nothing in which the inhabitants of the municipality can be said to be pecuniarily or indirectly interested or concerned as affecting their good or welfare could then be excluded. It would lead to unexpected results if the passing of a resolution by the council should be taken to authorise an inquiry merely because the council therein asserted that its interests were involved.

Mr. Justice Middleton has, in *Re City of Berlin and County Judge of the County of Waterloo*, 33 O.L.R. 73, used language which indicates that he felt pressed with the same difficulty. He said (pp. 75, 76):—

“The words which I have quoted from sec. 248 are undoubtedly very wide. Practically everything in one way or another concerns the good government of the municipality, and some limitation must necessarily be found to the wide terms used. Similar wide expressions are found in sec. 250: ‘Every council may pass such by-laws and make such regulations for the health, safety, morality, and welfare of the inhabitants of the municipality . . . as may be deemed expedient.’ No one supposes that this general provision confers unlimited jurisdiction upon the municipal council; yet it might well be argued that all laws dealing with every possible topic are presumed to be passed in the interest of the health, safety, morality, and welfare of the inhabitants.

.

“In our scheme of municipal government some matters concerning the welfare of the inhabitants are taken from the jurisdiction of the municipal council and vested in other legislative and administrative bodies. School affairs are entrusted to school boards and boards of education; certain public utilities are placed in charge of boards specially constituted; and the affairs relating to the police force are placed in the hands of police commissioners. I do not think it is competent for the municipal council to direct an inquiry before the County Judge into the matters entrusted to these independent bodies. Within the limits of the jurisdiction conferred upon these bodies they are supreme and in no sense subordinate to the municipal council. This has been de-

monstrated in a series of cases in which the municipal council has undertaken to review the action of school boards."

See also *Simpson v. Local Board of Health of Belleville* (1917), 41 O.L.R. 320.

I find no case, as yet, under the section, where the matter was not a matter clearly within the purview of the council's own duties or related to its own undoubted concerns. See *In re Godson and City of Toronto* (1888-1890), 16 O.R. 275, 16 A.R. 452, 18 Can. S.C.R. 36 (suggested malfeasance of the inspector of the city); *Lane v. City of Toronto* (1904), 7 O.L.R. 423 (investigation of an election of aldermen and school trustees, which was held under the supervision of city officials); *Chambers v. Winchester*, 15 O.L.R. 316 (investigation of a municipal official). It is true that the conduct of business by the Toronto Board of Education was investigated under this section, but no objection was made, and no decision was asked for by those concerned, as to the legal right to hold it, and it therefore has no effect as an authority on the subject.

It may be well to trace the formation and scope of the body here whose business is sought to be treated as that of the municipality.

By the Municipal Waterworks Act, R.S.O. 1897, ch. 235, sec. 40, it was provided that, with regard to municipal waterworks, the council might either exercise all the powers, rights, authorities, and immunities with respect to those municipal works, or might by by-law provide for the election of commissioners for such purpose.

By subsec. 2 of sec. 40 it was provided that:—

"Upon the election of commissioners, all the powers, rights, authorities, or immunities which, under this Act, might have been exercised or enjoyed by the council and the officers of the corporation acting for the corporation, shall and may be exercised by the commissioners and the officers appointed by the commissioners, and the council thenceforth during the continuance of the Board of Commissioners shall have no authority in respect of such works."

In 1906, by an Act to provide for the Transmission of Electrical Power to Municipalities, 6 Edw. VII. ch. 15, the Hydro-Electric Power Commission was constituted, and municipalities were empowered to contract with it for a supply of electrical power for lighting, heating, and power for themselves and for the inhabitants of the municipality.

In 1907, by 7 Edw. VII. ch. 82, the Corporation of Peterborough obtained power to purchase the plant and business of the

App. Div.

1925.

CAMPBELL
FLOUR
MILLS Co.
LTD.

v.
CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

App. Div. Peterborough Light and Power Company, subject to the approval
1925. of the agreement by the Hydro-Electric Power Commission of
CAMPBELL Ontario, and to develop and sell electric energy or to receive,
FLOUR rent or lease it, subject to such conditions as to rates, etc., as the
MILLS CO. Hydro-Electric Power Commission prescribed. The Water Com-
LTD. missioners of Peterborough were thereby (sec. 6) constituted a
v. body corporate in whom the management, control, and operation
CITY OF of the business was vested, and they were thenceforth *to have*
PETER- *vested in them all the rights, powers, authorities, immunities and*
BOROUGH. *duties conferred upon a municipal council entering into a con-*
Hodgins, *tract with the Hydro-Electric Power Commission under 6 Edw.*
J.A. *VII. ch. 15. That Act gave the municipal corporations which*
entered into a contract with the Power Commission the same
powers, duties, and obligations as were given them under previous
Acts which enabled them to construct and acquire works for the
supply of electricity.

Under sec. 3 of the Act of 1907, the rates charged were to be subject to regulations by the Hydro-Electric Power Commission, which "may from time to time for that purpose examine the books of the said water commissioners and proceed as provided by section 19 of the said Act"—that is, the Act to provide for the Transmission of Electrical Power to Municipalities, 6 Edw. VII. ch. 15. That section (19) gives powers of investigation to the Hydro-Electric Power Commission into rates charged by the municipal corporation, which are practically identical with those mentioned in the contract validated and confirmed by the statute of 1913, which I set out below.

On the 5th March, 1913, a contract was entered into between the Corporation of Peterborough and the Hydro-Electric Power Commission whereby the commission was exclusively to supply the corporation with electric energy for 30 years. The engineers of the commission were given the right to inspect the corporation's apparatus and to take records. In case of any difference between the commission and the corporation, the commission was empowered to appoint a time and place to hear all representations and when possible to adjust the differences. The commission was also to have all the powers which could be conferred on a commissioner under the Act respecting Inquiries concerning Public Matters. The provisions of this agreement were confirmed and declared to be legal, valid, and binding by the Power Commission Act, 1913, 3 & 4 Geo. V. ch. 12, sec. 5. By (1914) 4 Geo. V. ch. 87, an Act respecting the City of Peterborough, which recites the statute of 1907, the Peterborough Water Commissioners are declared to be a

Public Utilities Commission under R.S.O. 1914, ch. 204, and are to continue, as the statute states, "to be a body corporate, and *all special or general authority, powers and duties conferred or imposed by any Act now in force upon the Peterborough Water Commissioners or conferred or imposed by the Public Utilities Act on a Public Utilities Commission and the commissioners thereof are hereby conferred and imposed upon the Peterborough Utilities Commission and the commissioners thereof* and the provisions of any Act now in force affecting the Peterborough Water Commissioners, together with the provisions of the Public Utilities Act in so far as they are applicable to and not inconsistent with any such Act, shall apply to the said Peterborough Utilities Commission and the commissioners thereof."

App. Div.
1925.

CAMPBELL
FLOUR
MILLS CO.
LTD.

v.
CITY OF
PETER-
BOROUGH.

Hodgins,
J.A.

The authority, powers, and duties conferred on a Public Utilities Commission by the Public Utilities Act, R.S.O. 1914, ch. 204, are those of control and management, and, when a contract is made by the corporation with the Hydro-Electric Power Commission, a Public Utilities Commission is required to be established for that purpose. Section 35 provides that after the establishment of such a commission its powers, rights, etc., shall be exercised by the commission and not by the council. By this statute authority was given to take over the Peterborough Light and Power Company.

It was argued that secs. 8, 9, and 10 of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, enlarged the meaning of the words "part of its public business." These sections make the "inhabitants" a body corporate, under the name of "The Corporation of the City of Peterborough," and provide that the powers of a municipal corporation shall be exercised by its council. But these sections in no way, in my opinion, derogate from the devolution upon the Water Commissioners of Peterborough of the authority to manage and direct the business entrusted to them as a statutory corporation by the statute of 1907, and a Public Utilities Commission, under the statute R.S.O. 1914, ch. 204. These were formerly conferred upon the municipal council, whose authority was by the statute of 1897 and by that of 1914 excluded while the Board of Commissioners continued.

To hold otherwise would be to beg the question, because, while the Corporation of the City of Peterborough represents the inhabitants, it does so only so far as the Legislature consents to the business of those inhabitants being so represented, and not where they are, as to the supply and distribution of electrical energy, represented directly, by force of special legislation, by the

App. Div.
1925.

CAMPBELL
FLOUR
MILLS CO
LTD.
v.
CITY OF
PETER-
BOROUGH.
—
Hodgins,
J.A.

Public Utilities Commission. There is no power, save that of the Legislature, to divert from the Water Commission of Peterborough the power and authority given to it by the legislation I have outlined. It is for this reason that I do not think *Young v. Town of Gravenhurst*, 24 O.L.R. 467, is in point. Under the peculiar legislation relating to Peterborough, which I have set out, the Water Commission are not merely the servants and agents of the Corporation, as was the case there. They are constituted an independent authority, and, while they exist, the Corporation of Peterborough is debarred from exercising the powers, etc., entrusted to them.

The conclusion to which I feel bound to arrive is that the matter sought to be investigated under the council's resolution is no "part of its public business," but is solely that of the Water Commission of Peterborough as a Public Utilities Commission.

In that view the injunction was properly granted and the appeal must be dismissed with costs.

There is one matter which ought to be mentioned. Counsel for the learned County Court Judge appeared before us and opened and argued the appeal as if his client was not only willing but anxious to press for the inquiry. As the argument proceeded, comment was made on that aspect of the case, and it then appeared that the learned Judge had previously informed the Registrar of this Court in writing that his presence on the appeal was due to the desire of the Mayor of Peterborough that Mr. Hall, K.C., should represent the County Court Judge on the appeal, and that in consenting he stipulated that he must be regarded as absolutely independent in the matter and desired to submit to the direction of the Court. This is a most correct attitude, and it is due to the learned Judge that this should be clearly set forth in disposing of this appeal.

Appeal dismissed with costs

[APPELLATE DIVISION.]

[IN BANKRUPTCY.]

RE BRYANT ISARD & Co.

1925.

Jan. 8.
June 27.

Bankruptcy — Trustee — Disbursements — Sums Paid to Partners and Clerks—Employment of Partner as Accountant—General Rule Governing Trustees—Modification by Bankruptcy Act, sec. 40, subsec 3, as Amended by 13 & 14 Geo. V. ch. 31, sec. 23—Sec. 20, subsec. 1(d) —Bankruptcy Rule 108A.

The trustee under the Bankruptcy Act of the estate of a firm of stock-brokers was himself an accountant and had partners who shared with him his fees as a trustee in bankruptcy, he sharing with them in the firm's profits; and the firm had a staff of employees in its office. The trustee, without the authority of the inspectors, employed one of his partners, who was an accountant, in unravelling the affairs of the estate, and also employed the members of the firm's office staff in doing necessary work in the administration:—

Held, that where an accountant's work is indispensable a trustee may be allowed to charge against the estate, as a disbursement, subject to taxation, a fee for his partner's work as accountant, provided that the trustee renounces any profit thereby accruing to him.

But payments made to the firm for the work of its employees must be disallowed as disbursements, their services being treated as part of his work in earning the percentage fixed by the Bankruptcy Act, unless allowed by the inspectors and the Court as an extra expense.

Sections 20 and 40, especially subsec. 1(d) of sec. 20 and subsec. 3 of sec. 40 (as amended by 13 & 14 Geo. V. ch. 31, sec. 23), of the Bankruptcy Act, considered.

Review of the authorities.

Ex p. Newton (1849), 3 DeG. & Sm. 584, not followed.

Bankruptcy Rule 108A, passed in 1924, could not limit the trustee's vested right, which had accrued before that year.

The general rule that a trustee must not profit by his trust applies to trustees in bankruptcy, subject to carefully guarded and defined statutory modifications.

The meaning of sec. 40(3) is, that the trustee is to be confined to five per cent. of the cash receipts in all circumstances, unless the inspectors, in writing, increase the amount, and the Court approves.

APPEAL by the executors of a former (now deceased) trustee from the taxation by the Taxing Officer of the disbursements of the deceased trustee in the administration of the bankrupt estate of the debtor firm.

December 23, 1924. The appeal was heard by FISHER, J., in Chambers.

P. E. F. Smily, for the executors.

J. A. Macintosh, K.C., for the present trustee.

Fisher, J.
1925.
RE BRYANT
ISARD
& Co.

January 8, 1925. FISHER, J.:—On the taxation of the former trustee's disbursements it appears that the trustee, without obtaining the permission of the inspectors, engaged certain members of his own firm as accountants to do work on the books of the insolvent company, both in Montreal and Toronto, and paid out of the estate-moneys large sums to these accountants. The Taxing Officer disallowed the claims, holding that a trustee could not engage a member of his own firm as an accountant and charge the services of the accountant as a disbursement, because of the fact that the trustee was entitled under the terms of the partnership to a share of the services of the accountant engaged, and so he would, in addition to his remuneration, be receiving a share of the disbursements practically paid to himself. The trustee now appeals from the decision of the Taxing Officer.

The Bankruptcy Act was framed with the deliberate intention of curtailing extravagant charges on the part of trustees and solicitors in connection with the administration of insolvent estates, by providing that inspectors be appointed by the creditors for a trustee to consult with, in the administration of the estate, by fixing a trustee's remuneration—see sec. 40, subsecs. 1, 2, and 3—and that his disbursements must be taxed unless taxation is waived by the creditors or inspectors—subsec. 4; that without the written permission of the inspectors he cannot sell the property of the debtor, carry on the business, institute or defend actions or refer disputes to arbitration, employ solicitors, mortgage or pledge the property, or make compromise: see sec. 20 (1), (a) to (k), and (2): "The permission given for the purposes of this section shall not be a general permission to do all or any of the above mentioned things, but shall only be a permission to do the particular thing or things or class of things which the written permission specifies."

It will therefore be seen how limited the trustee's authority really is.

It is of the utmost importance to creditors, and in fact they demand, that an insolvent estate should be advantageously administered by their trustee, and it must not be forgotten that at the same time the trustee is obliged to give security and strictly to observe the provisions of the Bankruptcy Act in the distribution of an estate committed to his charge.

When creditors appoint a trustee to administer an insolvent's estate, they cannot, so to speak, tie his hands and at the same time expect a business-like administration. The trustee is entitled to assume that he must, to the best of his ability, act in the administration of the estate with as much care as if the property

he is called upon to administer belonged to himself. It cannot be expected that in trifling matters, or when something suddenly arises in regard to which, in order to protect the property of the insolvent, he would require to act quickly, he must first consult with and obtain the written consent of the inspectors; but at the same time the trustee must be aware that his duties are statutory and thus limited. The trustee knows that his remuneration is fixed unless increased under sec. 40 (1) of the Act; and, if the trustee is of opinion that the remuneration will not permit the engaging of the special services of an accountant, he should then bring the matter to the attention of the inspectors, and if they refuse he should either resign or go on and take what the Act allows him.

After the trustee had been appointed, he is alleged to have engaged certain members and employees of his own firm to perform accountancy work in connection with the insolvent's estate in Toronto and Montreal, and has charged, as a trustee's disbursement against the estate, for the services of these accountants, and, as regards the employees, the profits accruing to the firm by their employment.

If he was obliged to do that kind of work on the books of the insolvent company in Toronto, then it must be conceded, if a proper and prompt administration was to be had, he would have to employ an accountant to examine the books in Montreal, as he could not be both in Montreal and Toronto.

In this particular case the trustee was not only an accountant, but the members of his own firm were also accountants, and he employed and paid them (as his account for disbursements rendered shews) large sums of money for their services. These accountants were entitled to participate in the profits of this firm. The trustee was also entitled to participate in the profits of this firm, and the trustee and the members of his firm were entitled to participate in the remuneration received by Mr. Thorne as trustee. It sometimes happens that a trustee has in his regular employment men to whom he pays large salaries, and whenever it becomes necessary these experts are employed. It seems to me it would be manifestly unfair that a trustee should be expected to pay for the services of these men out of his own remuneration, instead of charging their services under the heading of trustee's disbursements, simply because these experts happen to be regular employees of the trustee. If a trustee has in his employment trained experts, they are likely to give, as a result of their experience, much more efficient services than outsiders whose duties and experience have not been so closely connected with insolvent estates. I cannot, therefore, see any substantial objection to such a course simply

Fisher, J.

1925.

RE BRYANT
ISARD
& Co.

Fisher, J. because there might exist an understanding between the trustee and his employees that the work the experts are assigned to do should be prolonged, as the Act specially provides that all trustee's disbursements are to be taxed by an officer of the Court before payment.

1925.
RE BRYANT
ISARD
& Co.

Other than the case of *In re Bourassa* (1923), 4 C.B.R. 136, wherein Panneton, J., decided that a partner of the bankruptcy trustee was not entitled to charge for accountants' services as one of the trustee's disbursements, I have not been able to find any case under the Bankruptcy Act, either in England or here, covering the point I am called upon to decide on this appeal; but, although allowances to executors and administrators for compensation expenses come under a different statute, it has been held that if the accounts are found to be complicated executors or administrators may take it upon themselves to adjust and settle them, although it may occupy a great deal of time and attention. The principle of equity is that they cannot claim compensation; but, if they choose to save their own trouble by the employment of an accountant, they are entitled to charge the estate with it under the head of expenses. See *New v. Jones* (1833), 1 Mac. & G. 668, note; *Henderson v. McIver* (1818), 3 Mad. 275; *Worrall v. Harford* (1802), 8 Ves. 4, where it was decided that the indemnity of a trustee under a deed of trust does not give the persons employed by him a right, as creditors, against the trustee's fund.

Take the facts in connection with the present case. It may be that some accountancy work was necessary to be done on the books of the insolvent company both in Montreal and Toronto, but the trustee himself was an accountant and would be expected to perform such services. That is what he was being paid for in the way of remuneration. Supposing, however, he was not an accountant, and it was necessary to have the services of an accountant, and he employed one without the permission of the inspectors, I am of opinion that he must pay for the accountancy work out of his own remuneration.

The trustee in this case paid himself, without the permission of the inspectors or creditors, \$6,000, and his estate expects to be entitled to receive additional remuneration. If an estate requires the services of bookkeepers and stenographers to do clerical work, these services are not chargeable to the estate as trustee's disbursements unless authorised by the inspectors. The trustee's remuneration covers these; and, unless a trustee is obliged to act in an emergency to protect the estate, he has no right, without the written permission of the inspectors, to incur a liability to the

estate for services of a clerical nature. The \$6,000 already received by the trustee (whether the sum is or is not a proper remuneration will depend on the action of the creditors or Court under sec. 40) would, in my opinion, be a very fair remuneration for any trustee to earn for many months' services, even if he devoted all or most of his entire time to one estate.

Fisher, J.

1925.

RE BRYANT
ISARD
& Co.

There is no evidence that the books were not properly kept or that it was necessary to engage expert accountants to go over them; and I cannot conceive how it would be possible for so much time to be occupied by accountants on these books as is shewn in the trustee's account for disbursements as rendered.

It seems to me, if an accountant was ever necessary, one expert could in at least one month have completed his duties and left it to bookkeepers to do the clerical work. In any event it should be shewn that it was necessary to have accountants to go over the books.

I am of opinion that there is no power or right under the Bankruptcy Act for a trustee—without the permission of the inspectors—to engage the services of an accountant and charge for his services as a disbursement. If he does engage an accountant—unless the inspectors agree to pay him—he must do so out of his own trustee's remuneration.

I think in this case—if the inspectors are satisfied that it was in the interests of the estate, and the estate benefited by the work done by these accountants both in Montreal and Toronto—that a reasonable sum should be allowed in addition to the travelling and other expenses of the accountants to and while in Montreal and returning therefrom.

From what appeared on the application to confirm the report of the Registrar in this matter, which came on to be heard the same day as this appeal, it seems clear that the trustee's costs and disbursements in reference to the proceedings before the Registrar in relation to certain funds and securities held by the trustee will have to be dealt with separately from those relating to the general administration of the debtor's estate, and it will therefore be convenient and a saving of expense if the Taxing Officer is now directed to ascertain and state as a special circumstance how much of the costs and expenses of the former trustee relate to the funds and securities which were the subject of reference to the Registrar. As regards the remuneration of the former trustee, regard will have to be had to the fact that part of the services in reference to these particular funds and securities have been rendered by the former trustee and part by the new trustee; and, so far as the

Fisher, J. remuneration is concerned, it will have to be apportioned between the two, having regard to the work done by them respectively.

1925.

RE BRYANT
ISARD
& Co.

With this direction, there will be an order declaring that the late trustee, without the written permission of the inspectors, was not entitled to engage his own partners as accountants and charge for their services as a trustee's disbursement; and the appeal must be dismissed with costs.

The executors of the deceased trustee appealed from the order of FISHER, J.

March 27. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

W. N. Tilley, K.C., and P. E. F. Smily, for the appellants, argued that the trustee in bankruptcy was entitled to employ his partner as an accountant, without the authority of the inspectors, and to employ members of the firm's office staff in unravelling the affairs of the estate, as they were not agents, but employees. There is nothing in the Bankruptcy Act to prevent this, and the Act provides a safeguard against a trustee incurring unnecessary expense for the estate, by providing that his disbursements must be taxed, unless taxation is waived by the creditors or by the inspectors. The learned Judge in Bankruptcy erred in holding that if it was necessary for the trustee to have the services of an accountant and he employed one without the permission of the inspectors, he must pay for this out of his own remuneration. The rule applicable in this case is found in a number of cases, such as *Liquidators of Imperial Mercantile Credit Association v. Coleman* (1873), L.R. 6 H.L. 189; *Ex p. Newton* (1849), 3 DeG. & Sm. 584; *Broughton v. Broughton* (1855), 5 DeG. M. & G. 160; *In re Doody*, [1893] 1 Ch. 129; *In re Corsellis* (1887), 34 Ch. D. 675; *In re Smith's Estate*, [1894] 1 I.R. 60; *Clack v. Carlon* (1861), 30 L.J. Ch. 639; *In re Bourassa*, 4 C.B.R. 136.

H. J. Scott, K.C., and J. A. Macintosh, K.C., for the present trustee, respondent, argued that the matter was *res judicata* by reason of the judgment of Fisher, J., in *Re Bryant Isard & Co., Ex p. Higginson* (1923), 4 C.B.R. 41, 24 O.W.N. 597; also that the trustee had no right to employ a partner as an accountant without the authority of the inspectors, and to charge against the estate the partner's fee as a disbursement. They also denied the right of the trustee to employ members of the firm's office staff and to charge against the estate a fee for their work as a disbursement. He referred to sec. 40 of the Bankruptcy Act, subsec. 3, as amended in 1923, and Bankruptcy Rule 108A.

Tilley, K.C., in reply, contended that Rule 108A does not apply, as the trustee died before the Rule came into force, and his estate would be entitled to whatever his rights were at the time of his death. He also contended that the point was not *res judicata* by the earlier decision in this case, cited above. He referred to *In re Blundell* (1888), 40 Ch. D. 370.

App. Div.

1925.

RE BRYANT

ISARD

& Co.

June 27. The judgment of the Court was read by HODGINS, J.A.:—Appeal from an order, dated the 8th January, 1925, of Fisher, J., sitting in Bankruptcy, on appeal from the Taxing Officer's interim report of the 14th November, 1924.

This appeal raises an important question as to the right of a trustee in bankruptcy who is himself an accountant and who has partners and employees and whose partners share with him his fees as a trustee in bankruptcy and he shares with them in the firm's profits:—

(1) To employ, without the authority of the inspectors, a partner who is an accountant in unravelling the affairs of an estate (in this case those of a firm of stockbrokers) and to charge against the estate a fee for his work, as a disbursement; and

(2) To employ the members of his firm's office staff and to charge against the estate a fee for their work during the time they were so engaged, as a disbursement.

The statutory provisions as to the commission to be taken by the trustee are to be found in sec. 40 of the Bankruptcy Act, as amended in 1923, by 13 & 14 Geo. V. ch. 31, sec. 23. The fundamental rule is in subsec. 3: "The remuneration of the trustee for all services shall not *under any circumstances* exceed five per cent. of the cash receipts, *except with the approval in writing of the inspectors and of the Court.*"

Bankruptcy Rule No. 108A reads:—

"(1) Unless the Court otherwise orders, the fee of the trustee shall be deemed to cover all services performed by the trustee, his partners and employees"

"(2) The disbursements of the trustee shall not include charges for typewriting or duplicating notices or statements; or rent of the trustee's office, or storing books and records.

"(3) Subject to the provisions of the Act and of this Rule the Court shall determine what fees and disbursements are properly chargeable by the trustee."

This Rule was passed in 1924, and (it is said) cannot limit the trustee's vested right, which had accrued before that year.

On the other hand, it was urged that the trustee's estate is bound by an earlier judgment in this case, reported in 4 C.B.R. 41.

App. Div.
1925.

RE BRYANT
ISARD
& Co.

Hodgins,
J.A.

I think it must be taken as the policy, and indeed the meaning, of the statute that the trustee is to be confined to five per cent. of the cash receipts under all circumstances, unless the inspectors who represent the creditors increase it in writing, and the Court allows the larger sum.

I do not think Rule 108A can affect the rights of this trustee's estate under the Bankruptcy Act. The trustee died on the 1st July, 1923, before this Rule was enacted, and whatever his rights then were his estate must get. Nor do I think the judgment of Fisher, J., in 4 C.B.R. 41, is in any way *res judicata* as affecting this case. While the views of the learned Judge are those which he has fully expressed in the judgment in appeal, the formal order in the earlier case refers the matters of disbursements to the Taxing Officer for a report. The learned Judge's reasons, when considering how he would dispose of the matter before him, did not purport to be final or to conclude the questions involved here, and he has himself considered them to be open to discussion on the appeal to him from the Taxing Officer.

It appears that the deceased trustee in this case had, without the consent of the inspectors or of the Court, paid himself and his firm or employees the amounts set out in the earlier judgment of Mr. Justice Fisher to which I have referred. He was thereby ordered to repay the whole sums pending taxation. This is the correct procedure. See *Liquidators of Imperial Mercantile Credit Association v. Coleman* (*infra*).

I need not repeat the statement of facts given in 4 C.B.R. 41, nor the views of the learned Judge in this case. He has disallowed the fees charged for the partner-accountant and the amounts charged for the work of the employees, but as to the services of an accountant in Montreal he leaves that for the inspectors to determine. What has to be decided here has been sufficiently indicated already.

The rule that must govern is one which affects all who occupy a fiduciary position in relation to others.

It is important that no doubt should exist as to the existence of this rule and its application to trustees in bankruptcy as well as to trustees generally. It has been adhered to in the cases of trustee-solicitors, trustee-mortgagees, and others.

While in this Province and under the Bankruptcy jurisdiction, trustees are allowed by statute to profit by their trust, that profit is in the latter case somewhat carefully guarded and defined. Any one, therefore, who becomes a trustee in bankruptcy proceedings knows exactly what he will receive, and he must govern himself

accordingly. If the work demanded of him proves to be intricate and onerous, there are avenues of which he may avail himself, namely, by seeking the approval of the inspectors and of the Court to an increased allowance.

In this particular case, as the business was that of a stock-broking firm operating both in Toronto and Montreal and was quite extensive and needed rapid and expert attention, the services of an accountant were indicated, and no doubt those of a clerical office staff were required. I would be inclined to lean towards the allowance of somewhat liberal fees and disbursements in a case such as this, were it possible to regard only the usual course of modern and systemised business.

I do not myself think that, because the trustee is an accountant and so personally qualified to understand and analyse the business of the bankrupt, he is not entitled, because of sec. 20, to use his business discretion and to employ others without the previous consent of the inspectors. Clause (d) of subsec. 1 of that section refers to specific proceedings or business which require previous sanction, and do not prevent, in my judgment, carrying on the usual business of a bankruptcy trustee in the way in which it is usually conducted, by means of agents or employees.

The powers of a trustee, in relation to the affairs of the estate, are extensive and are detailed in the Act; but, while the doing of these things must be preceded by the consent of the inspectors, the trustee's mode of accomplishing them must generally be left to his discretion, in the absence of specific instructions in that respect. But this is a very different thing from permitting him to regard what he thus does as entitling him to treat his expenditures as proper disbursements.

The financial effects on the estate of this exercise of his business judgment is to be controlled by the Taxing Officer and by an appeal thereafter to the Judge. He must, however, in my judgment, when deciding upon the quantity and kind of service required, have due regard to the scrutiny to which his expenditure must be subject. And he cannot expect the Court to give him what the policy of the law shuts him out from receiving.

He must keep himself within the rules laid down by the general law for a trustee, except where they are modified by the Bankruptcy Act. He cannot disregard them unless he is given permis-

App. Div.

1925.

RE BRYANT

ISARD

& Co.

Hodgins.

J.A.

*20. (1) The trustee may, with the permission in writing of the inspectors, do all or any of the following things:—

(d) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the inspectors.

App. Div.
1925.

REBRYANT
ISARD
& Co.

Hodgins.
J.A.

sion so to do after full disclosure of the circumstances to the inspectors and the Court.

The rule which must govern the decision here is to be deduced from a consideration of those judgments which have dealt with a trustee's position and duties under somewhat analogous circumstances.

In *Broughton v. Broughton* (1855), 5 DeG. M. & G. 160, Lord Cranworth, L.C., stated a general principle in these words (p. 164):—

“The rule applicable to the subject has been treated at the Bar as if it were sufficiently enunciated by saying, that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this Court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is, that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust, namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee, and the only question is, how far the circumstances of the present case take it out of this rule.”

In *Christophers v. White* (1847), 10 Beav. 523, it was decided that this general rule applied, although all the business had been transacted by the partners of the solicitor-trustee and not by the trustee himself.

In *In re Doody*, [1893] 1 Ch. 129, Stirling, J., said (pp. 136, 137):—

“The rule, it is said, being simply that the solicitor-mortgagee is not entitled to remuneration for his own trouble, what is there to prevent his partner from receiving remuneration for his trouble? In my opinion, the rule does not prevent the partner from receiv-

ing remuneration, but the question immediately arises, what is the partner's remuneration to be? If the partners enter into an agreement that the mortgagee-solicitor is not to share in the profits arising from the transaction, I should feel free to hold that the usual costs were to be allowed in full: in the absence of such an agreement it does not seem clear that this ought to be done. . . . The rule is that the mortgagee-solicitor is not to be remunerated for his own trouble: *â fortiori*, he cannot be allowed remuneration for the trouble of some one else."

App. Div.

1925.

RE BRYANT
ISARD
& Co.Hodgins,
J.A.

In the same case the proper practical way of applying the rule is indicated, i.e., to allow the partner the same share of the profit costs in the specific matter as he is entitled to in the general profits of the partnership business.

In *New v. Jones* (1833), 1 Mac. & G. 668, note, Lyndhurst, C.B., said (pp. 671-672), in speaking of the case of an attorney-executor performing business necessary to be transacted for the trust:—

"If this attorney, being an executor, performs those duties himself, he, in my opinion, is not entitled to be paid for the performance of those duties: it would be placing his interests at variance with the duties he had to discharge. It was said that the bill might be taxed, and that this would be a sufficient check: I am of opinion that it would not: the estate had a right, not only to the protection of the Taxing Officer, but also to the vigilance and guardianship of the executor, in addition to the check of the Taxing Officer. There might be cases (I do not speak with reference to the present case) where a trustee, placed in the situation of a solicitor, might, if he were allowed to perform the duties of a solicitor, and to be paid for them, be so placed that he might find it very often proper to institute and carry on legal proceedings, which he would not do, were he to derive no emolument from them, and were to employ another person. In point of prudence and propriety, and as a guard over the estate, I am of opinion that it would not be proper that a solicitor who was a trustee should be distinguished from an ordinary trustee."

In *Clack v. Carlon* (1861), 7 Jur. N.S. 441, 30 L.J. Ch. 639, where a trustee-solicitor agreed with his partner that the partner should act as solicitor to the trust and receive the profits for his own benefit, Sir W. P. Wood, V.-C., said:—

"It is distinctly sworn in this case that no such profit is received or receivable by Mr. Carlon. No doubt there is force in the argument that such an arrangement affords a means of collusion and duplicity; but the same remark applies with no less force to the case of a solicitor-trustee who employs another solicitor. It

App. Div.
 1925.

RE BRYANT
 ISARD
 & Co.

Hodgins,
 J.A.

was said that partners might make an arrangement each to take the other's trustee business, and that thus a door for fraud be opened. It does not seem to me that such an arrangement necessarily implies any more fraud than a similar arrangement between two distinct firms, in which case, I think, there is nothing that could be argued necessarily to shew fraud."

In *Liquidators of Imperial Mercantile Credit Association v. Coleman*, L.R. 6 H.L. 189, Lord Cairns said, at p. 208:—

"I may meet the argument by a very familiar case, which occurs constantly in a Court of Equity, where a trustee, who is a solicitor, and a member of a firm, without authority, charges for his professional services and trouble, although he is a trustee. It has been held repeatedly that if that charge is made and not paid, it must be disallowed; that if paid, it must be refunded; and that which is to be refunded is the whole of the charge and not merely the share of the trustee in the profits of the concern of which he is a member."

In *In re Williams* (1902), 4 O.L.R. 501, Street, J., speaking for a Divisional Court, said (p. 505):—

"The general rule is that a trustee-solicitor is not entitled to charge the estate with any professional services, for to allow him to do so would be to violate the rule that a trustee is not to be placed in a position where his duty and his interest conflict. An exception however, which is not to be extended, has been established by the decision of Lord Cottenham in *Cradock v. Piper* (1850), 1 Mac. & G. 664, under which a solicitor-trustee who brings or defends proceedings in Court for himself and his co-trustee is entitled to recover profit costs and therefore to charge such costs to the estate, but such costs are not to be increased by the fact that he is himself a party beyond what they would have been had he acted for his co-trustee only. This exception is not to be extended to proceedings or professional services rendered to the estate out of Court: see *In re Corsellis*, 34 Ch. D. 675; *Broughton v. Broughton*, 5 DeG. M. & G. 160; *In re Doody*, [1893] 1 Ch. 129, 138, 139, 141; *Re Mimico Pipe and Brick Manufacturing Co.* (1895), 26 O.R. 289; Lewin on Trusts, 10th ed."

The result of these cases and acquaintance with the rule which they apply, leads me to think that one aspect of this case may be dealt with without impairing the effect of the rule, if the difference between the case of a trustee in England and here is considered. There no remuneration is allowed to an ordinary trustee: here it is specifically provided for, and its extent is governed by certain statutory conditions. I think that the trustee was in this

case entitled to employ an accountant. He engaged his partner, and I think the rule has been relaxed far enough to permit this, provided the trustee renounces or has renounced any profit accruing thereby to him. In the cases I refer to, the trustee was only allowed in the accounts, as a disbursement, so much of the whole fee charged for his partner's work as represented what the partner would have been entitled to receive as his share of that fee if it had been received as part of the income of the general partnership business. In this case the share to be allowed would be four-fifths, or such other proportion as the Taxing Officer shall find to be the remaining partners' share, as there are six sharing partners, including the trustee. This may be permitted here if the executors of the trustee file a satisfactory renunciation with the Taxing Officer. I judge that the learned Judge in Bankruptcy does not consider the employment of an accountant in this case to be unreasonable.

With regard to the services of his employees, this is a more difficult matter. As the trustee bears his share of their salaries, there is no way in which he can escape benefiting himself if their remuneration is paid out of the "trust estate." Abandoning all claim to profit charges on their work only meets part of the difficulty. I find no case where the trustee had been allowed to charge the salaries of his office staff used in carrying on his business, as a disbursement, much less a profit in addition thereto, except the one mentioned on the argument, *Ex p. Newton*, 3 DeG. & Sm. 584, a bankruptcy case, not cited in any work on Bankruptcy or Trusts, as far as I can discover. There a solicitor-assignee was allowed for the time of his clerk (but only at his salary rate) in doing copying work often sent out to a scrivener. Knight Bruce, V.-C., allowed it, treating it as equivalent to a disbursement proper if the work had been sent out to others in accord with the usual practice of solicitors. It is not a satisfactory decision and ought not to be allowed to weigh against the force of the well understood and clearly recognised rule which it disregards. As a recent illustration, by way of contrast, I may cite *Young v. Naval Military and Civil Service Co-operative Society of South Africa*, [1905] 1 K.B. 687, where Farwell, J., in disallowing the travelling expenses of a director in attending board meetings where a specified remuneration of £200 a year was provided for the directors by the articles, said (p. 694): "A paid agent is bound to discharge all the duties incident to his agency for the payment agreed on, and cannot make extra charges for work properly within the scope of his employment as agent." I think this applies where the work is done by his office staff as well as by himself personally. The evidence

App. Div.

1925.

RE BRYANT
ISARD
& Co.Hodgins.
J.A.

App. Div.
1925.
RE BRYANT
ISARD
& Co.
Hodgins,
J.A.

here shews that the method adopted was, as to a partner, to charge the fee per hour usual for accountants to receive for similar work. As to the employees who were paid a salary, a profit was included for their work per hour over and above the scale of their salary. In one case the yearly salary would work out at \$1.71 per hour and the profit thereon charged at 79 cents per hour; in another \$15 per day was charged in place of at the rate of \$2,500 per annum, and so on. In my judgment, while the disbursement as to the partner-accountant, upon the basis I have already mentioned, may be allowed, payments made to the firm for the work of its employees must be disallowed as disbursements, and their services must be treated, so far as the trustee is concerned, as part of his work in earning the percentage fixed by the Act, unless allowed as an extra expense by the inspectors. It is to be observed that his partners share in his fee, so that no injustice is done to them.

The order in appeal should be varied in accordance with this judgment, and there should be no costs of appeal, as success is divided. The present trustee's costs may be paid out of the estate.

Order of FISHER, J., varied.

[APPELLATE DIVISION.]

MCGREGOR AND MCINTYRE CO. LTD. v. STERLING APPRAISAL CO.
LTD.

1925.

June 29.

Contract—Employment of Expert to Make Appraisal of Buildings and Machinery for Fixed Fee — Report — Defects or Errors in two Branches—Payments on Account of Fee—Retention of Report—Expert Entitled to Payment—Damages in Respect of Defective Portions and Effect on whole Report—Appeal—Costs.

The defendant was employed by the plaintiff to make an appraisal of the plaintiff's buildings, machinery, and plant, and the defendant was to be paid a fee of \$1,000 for its work. The defendant made valuations and delivered to the plaintiff a written appraisal report, divided into three sections. Payments were made on account of the fee, but the plaintiff became dissatisfied with the report and sued to recover the amount it had paid, retaining the report. Errors were established in two sections of the report:—

Held, that the plaintiff was not entitled to recover as upon a total failure of consideration, but was entitled to damages in respect of the erroneous or defective portions of the report and to an additional sum for the weakening, by the errors in two branches, of the evidentiary value of the whole report.

The plaintiff's contention that the defendant agreed to do a specific work for a fixed sum, that that work had not been completed, and that the defendant was not entitled to any payment in respect thereof, was not tenable.

Review of the authorities.

H. Dakin & Co. Ltd. v. Lee, [1916] 1 K.B. 566, specially referred to. The damages assessed by the trial Judge were increased on appeal. Question of costs considered.

APPEAL by the plaintiff company from the judgment of the County Court of the County of York (TYTLER, Jun. Co. C.J.), in an action in that Court, brought to recover \$750 which had been paid by the plaintiff company to the defendant company for an appraisal report, the plaintiff company alleging a total failure of consideration. The defendant company counterclaimed for \$250, the balance of its fee of \$1,000 charged for the report. By the judgment of the County Court, the plaintiff company recovered against the defendant company \$350 for damages, with costs on the County Court scale; the counterclaim was allowed at \$250; and a set-off was directed, thus giving the plaintiff company judgment for \$100 and County Court costs.

The appeal was based on the contention that the appraisal report was entirely valueless and that the plaintiff company had received no consideration for the money paid to the defendant company.

App. Div.

1925.

McGREGOR
AND
McINTYRE
Co. LTD.
v.
STERLING
APPRAISAL
Co. LTD.

May 13. The appeal was heard by LATCHFORD, C.J., MIDDLETON and MASTEN, JJ.A., and FISHER, J.

Norman Sommerville, K.C., and *F. A. Campbell*, for the appellant company, contended that the contract was an entire one.

H. S. White, K.C., and *J. W. Bicknell*, for the defendant company, respondent, referred to Addison on Contracts, 11th ed., p. 881, and *Thornton v. Place* (1832), 1 Moo. & R. 218, there cited.

June 29. The judgment of the Court was read by MASTEN, J.A.:—The defendant company is engaged in the business or profession of making for its clients, or employers, detailed reports in writing shewing the actual value of their buildings, machinery, plant, etc. The plaintiff is an engineering and contracting company, owning and operating in Toronto extensive buildings and plant. In 1923 the plaintiff company employed the defendant company to make an appraisal of its buildings, machinery, and plant, and, by the special contract then made, agreed to pay \$1,000 for such report. The defendant company thereupon sent three of its appraisers (supposedly experts in their several departments) to make the necessary valuations. One man valued the brick-work, masonry, and carpentry work of the buildings, another valued the steel and iron construction in the buildings, and the third valued the machinery. Thus the report, like all Gaul, was divided into three parts.

On or about the 23rd May, 1923, the defendant company delivered to the plaintiff company, in writing, an elaborate and detailed appraisal report, covering the whole undertaking as above described, and almost immediately thereafter drew on the plaintiff for \$1,000, the stipulated fee for the report.

On the 29th May, the plaintiff company wrote to the defendant company saying that it desired to look over the report and check the estimates made by the defendant. Three days later, on the 1st June, without further communication, the plaintiff company paid the defendant company \$500 on account of its fee.

During the period from the 1st June to the 20th July, the defendant company's officers testify, they were from time to time pressing the plaintiff company for payment of the balance of the fee, and in answer the plaintiff company's officers questioned the accuracy of certain items in the appraisal, and asked the defendant company to reconsider and revalue the same; but the defendant's officers did not agree that this criticism on the part of the plaintiff was warranted. Thereafter, on the 20th July, Mr. Johnson and Mr. Kennedy, two of the representatives of the defendant company, met the plaintiff's officers, and after some con-

versation Mr. McGregor, president of the plaintiff company, dictated a letter, the terms of which were agreed to by Mr. Johnson on behalf of the defendant company. That letter reads, in part, as follows:—

“Re our appraisal of your property at 1139 Shaw street. Owing to the differences of opinion in regard to the costs contained in this report, we hereby agree to check over this report after you have made your own estimates of steel work and other items contained therein, and give you a properly amended report with the changes noted below. We will also separate the prices of the motors from the machines in every case and give you a separate price for each.”

The letter then proceeds to acknowledge the receipt of a further payment of \$250, which was on that date made by the plaintiff company to the defendant company, making in all \$750 then paid on account of the fee of \$1,000. This amended appraisal was never made, and for that failure each party blames the other. The onus was on the defendant to prove that it was not its fault that the re-valuation agreed upon was not made. There is a strong conflict of evidence on this point, and in regard to it the learned trial Judge says:—

“He (Asseltine) says he afterwards saw Mr. McIntyre and informed him that if he would give him invoices so as to shew the valuation he would place a different valuation on the machine. Mr. McIntyre did not do this, and I think that is the reason why that was not changed.

“So that I come to the conclusion that so far as the valuation of the machinery is concerned there was no real objection to it, or no objection which could not have been remedied if the plaintiff had given the defendant opportunity to do so.”

There was evidence on which he could reach that conclusion, and I discern no sufficient basis on which we can reverse him on this ground.

From the 20th July until the 8th November nothing of particular importance transpired, but on the 23rd November the plaintiff company wrote to the defendant company pointing out that its own engineers had on the 4th October made a further check of the steel construction in certain buildings. The letter reads in part as follows:—

“The inaccuracies of your report were so marked that we decided to spend no further time on checking your work. You will recall that you undertook to put competent men on this work and revise your report. Since that time we have heard nothing from

App. Div.

1925.

McGREGOR
AND

McINTYRE
Co. LTD.

v.

STERLING
APPRAISAL
Co. LTD.

Masten,
J.A.

App. Div.

1925.

McGREGOR
ANDMcINTYRE
Co. LTD.
v.STERLING
APPRAISAL
Co. LTD.Masten,
J.A.

you. I may close by stating that your appraisal is inaccurate and inconsistent with your letter of the 23rd March, and is of no value to us; and, unless the same is corrected and the facts regarding quantities, weights, and values are completed on or before the 10th December, we will ask you to return the money already paid you with interest up to that date."

Nothing further appears to have been done by either party until, on the 8th February, 1924, the writ in this action was issued by the plaintiff company, claiming the return of the \$750 theretofore paid. Meantime the written appraisal report which had been delivered on the 29th May, 1923, was retained by the plaintiff, is still so retained, and was produced by the plaintiff at the trial and filed as exhibit 4.

After a lengthy trial, the learned County Court Judge has found that there were serious and grave defects in certain parts of the report, more particularly in the estimate made by Kennedy, one of the defendant's appraisers, whose report dealt with the steel and iron which entered into the construction of the building. This branch of the estimate he finds to be of "no use or any estimable use to the plaintiff." He finds that this particular branch of the appraisal covers three-eighths in value of the whole work, and he disallows three-eighths of the \$1,000 which the defendant company was to receive under the contract. He holds that effect must be given to the contract, but with an allowance to the plaintiff of the sum of \$350 for the negligence or lack of skill of the defendant company in making the appraisal of the iron and steel.

The formal judgment in appeal is dated the 5th November, 1924. By it the plaintiff company recovered against the defendant the sum of \$350 for damages, together with costs on the County Court scale. The counterclaim of the defendant for \$250, balance of its fee, is allowed without costs, and a set-off is directed, thus giving the plaintiff judgment for the sum of \$100 and County Court costs. From that judgment the plaintiff appeals, on the ground that the appraisal report is entirely valueless and that the plaintiff company has received no consideration for the money paid by it to the defendant, or, using the old phraseology, the plaintiff claims to recover back the whole \$750 heretofore paid to the defendant company, on the common counts as for money had and received.

As a further ground the plaintiff submits that the defendant agreed to do a specific work for a fixed sum, and that such work has not been completed, and therefore the defendant is not entitled to any payment in respect thereof.

The trial Judge has, in the result, held, on the evidence, against

the above contentions of the plaintiff, and one of the questions before this Court is, whether there is evidence which would justify us in reversing that finding of fact by the trial Judge.

My perusal of the evidence and consideration of the authorities lead me to the following conclusions:—

There was admittedly a special contract for the making of an appraisal report for a fixed lump sum of \$1,000. The defendant has valued the plaintiff's buildings, plant, and machinery, and has delivered a report to the plaintiff which in form fulfils the contract, though parts of the report are erroneous. Thus the contract in question was completely, though defectively, performed. The plaintiff received the report in May, 1923, retained it, made two payments on account, and still retains it. The work of the defendant, as it appears in the report, is divisible and apportionable into three distinct parts, made by three different valuers, viz., mason and carpentry construction, steel construction, and machinery.

The onus is on the plaintiff company to attack each branch and to shew the incompetence of the defendant's valuator or such carelessness and recklessness as is incompatible with the common standard of practice, and the onus is also on the plaintiff to establish the particular errors complained of and the damage which the plaintiff has in consequence sustained.

No errors are shewn in that branch of the report which deals with the carpentry and mason work in the buildings. A branch not attacked in evidence cannot by inference be held to be erroneous or valueless. In the machinery branch of the report three machines and no more are shewn to have been incorrectly valued.

In such cases it is the duty of the plaintiff to minimise the damages: *Payzu Ltd. v. Saunders*, [1919] 2 K.B. 581; and I can discern no reason why the plaintiff should not have availed itself of the branch of the valuation dealing with mason and carpentry work, and why it could not have procured (from some other source if necessary) a scrutiny or revaluation of the three machines claimed to be erroneously valued. I quite appreciate that the evidential value of the report as a whole is lessened by the errors which have been disclosed, but that is entirely different from saying that it is wholly valueless.

Such an action as the plaintiff has brought, for rescission and return of all moneys paid, or for money had and received, on the ground of total failure of consideration, will not lie, both for the reasons above mentioned and also because the plaintiff has received and still retains the very thing bargained for, viz., the appraisal report, and has voluntarily made payments to the defendant com-

App. Div.
1925.

McGREGOR
AND
McINTYRE
CO. LTD.

v.
STERLING
APPRAISAL
CO. LTD.

Masten,
J.A.

App. Div.
1925.

McGREGOR
AND
MCINTYRE
Co. LTD.
v.

STERLING
APPRAISAL
Co. LTD.

Masten,
J.A.

pany after becoming aware of many, though perhaps not all, of the alleged errors: *Weston v. Downes* (1778), 1 Doug. 23.

I express no opinion as to whether the plaintiff (appellant) could, if it had acted promptly on receipt of the appraisal report, have rejected it. The fact is that it did not do so, but retained it, and from time to time made payments on the contract price.

It is true that the contract in this case is for work and labour rather than for a sale of goods (the report): *Wolfenden v. Wilson* (1873), 33 U.C.R. 442. But if it were a sale of goods the retention of the appraisal report after a reasonable time for inspection had passed would cancel any right to reject the goods, and leave the purchaser to sue on a warranty for defects in quality. I think that in a contract for work and labour a similar principle may, in some, though not in all, circumstances, apply. If I undertake to plough a field for A. and do it in such a way that I do more harm than good, A. has no opportunity of electing to reject my work; but, if I undertake to write a short story according to specifications for a magazine, and I deliver to A. a production which fails to conform to the contract, then A. may elect to reject or to keep it. If he keeps the manuscript and pays me on account, he certainly elects to pay me the agreed price less such damages as he can prove that he suffers because the story is not according to contract.

The circumstances here disclosed did not compel the plaintiff company to keep the appraisal report. The plaintiff company was, no doubt, entitled to a reasonable opportunity of examining the report; but, after a reasonable time for its examination, was bound either to reject and return it or to keep and pay for it. The plaintiff company cannot keep it and simply say it is no good. The retention of it implies a new promise to pay such remuneration as the report, considering its defects, is reasonably worth. On this point the learned trial Judge says in the course of his judgment:—

“When an appraisement is delivered, the persons for whom the appraisement was made may have a reasonable time to look it over and ascertain its correctness, and one would think that before any payment whatever was made, they would take the opportunity of looking it over to see whether it was correct or not. In this particular case, they did not do so, but on the other hand they paid shortly after the appraisement was delivered \$500, and not till a long while afterwards, running into many months, did they make any check or call the defendants to account as to inaccuracies, nor did they, up to the time of trial, shew accurately in what way the defendants had made a wrong estimate.

“I think, therefore, on that ground, they are precluded from having the contract set aside and from recovering back the amount

they have paid, but I think they are entitled, on account of the negligent action of the defendants in regard to their estimate of the structural steel, to have what damages they have suffered in regard to this."

I agree with this opinion of the trial Judge.

I am also of the opinion that the authorities are against the plaintiff's contention that the defendant agreed to do a specific work for a fixed sum, and that such work has not been completed, and therefore the defendant is not entitled to any payment in respect thereof. The notes to *Cutter v. Powell* (1795), 2 Sm. L.C., 12th ed., p. 1, afford a luminous discussion of this whole question, but I refrain from quotation, as the true rule appears to have been thoroughly established by numerous late cases to which I shall now refer.

The law on the subject was fully considered so far as it relates to building contracts, in the case of *H. Dakin & Co. Ltd. v. Lee*, [1916] 1 K.B. 566, where the earlier cases are reviewed. In that case the facts were as follows. The plaintiffs were builders. The action was brought to recover the sum of £352 4s. 4d., the balance of the price of certain repairs carried out by the plaintiffs at the defendant's house. The only question raised on the appeal related to a claim in respect of work described in a specification, which work it had been agreed should be done for £264. The defence was that the work referred to in the specification had not been completed, and the Official Referee had found as a fact that the contract had not been fulfilled in the three following instances:—

1. A letter from the plaintiffs which accompanied the specification stated that the concrete which was to be placed under a part of one of the side walls of the house, which was to be underpinned, was to be of a depth of 4 feet. Only 2 feet of concrete was placed there.

2. Columns of hollow iron, 5 inches in diameter, were to be used for a support of a certain bay window. The columns supplied were of solid iron 4 inches in diameter.

3. The joists over the bay window were to be cleated at the angles and bolted to caps and to each other. This was not done.

The defendant had resumed her occupation of the house after the plaintiffs' workmen had left.

The matters with which the appeal was mainly concerned were the concreting work in the underpinning of the side elevation and the rolled steel joists which were part of the work on the front elevation. The costs of these items were estimated so far as the concreting went at £60, and with regard to the other item at

App. Div.

1925.

McGREGOR
AND

McINTYRE
Co. LTD.

v.
STERLING
APPRAISAL
Co. LTD.

Masten,
J.A.

App. Div. £70, so that they were a substantial part of the work called for by the specification.

1925.

McGREGOR
AND
McINTYRE
CO. LTD.
v.
STERLING
APPRAISAL
CO. LTD.

Masten,
J.A.

The Official Referee held that the plaintiffs had not performed their contract, in that the defendant had been given something different from and less strong and secure than what she was entitled to have under the contract, and that the plaintiffs were therefore not entitled to recover any part of the contract price or any sum in respect of the contract work.

I have detailed these facts in order to make it plain that in that case the defective work formed a substantial part of the whole contract.

The plaintiffs appealed to a Divisional Court. Ridley, J., reviews the authorities beginning with *Farnsworth v. Garrard* (1807), 1 Camp. 38, and distinguishes *Forman & Co. Proprietary v. Ship Liddesdale*, [1900] A.C. 190, and *Appleby v. Myers* (1867), L.R. 2 C.P. 651. Sankey, J., lays down the rule in the following words:—

“I agree. I do not think that the Official Referee took the correct view of either the law or the facts. In my opinion the law applicable to cases of this sort is as follows. Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the work that he has done has been of no benefit to the owner; the contract, he is entitled to recover for his services, unless (1) (2) the work he has done is entirely different from the work which he contracted to do; or (3) he has abandoned the work and left it unfinished.”

In the Court of Appeal counsel for the appellants did not dispute the law laid down by the Divisional Court, but appear to have concluded that their appeal to succeed must be founded on the contention that the departures from the specification amounted to an abandonment of the contract. The judgment of the Court of Appeal is directed to that argument, and holds it to be absolutely and entirely wrong, but without negating or criticising the principles laid down by the Divisional Court.

The doctrines of the *Dakin* case have since been adopted and applied in the Courts of Ontario and other parts of Canada in numerous cases. I refer only to *House Repair and Service Co. Ltd. v. Miller* (1921), 49 O.L.R. 205, where Mr. Justice Hodgins, at p. 212, gives a reference to most of these cases. To these I add *Fisher v. Cox* (1921), 57 D.L.R. 567, at p. 569, and *Mertens v. Home Freeholds Co.*, [1921] 2 K.B. 526, a decision of the Court of Appeal in England.

The rule adopted in the *Dakin* case is not limited to building contracts, but has been applied in the case of architects, of solici-

tors, and of auctioneers. It was adopted by Wright, J., in the case of *Columbus Co. Ltd. v. Clowes*, [1903] 1 K.B. 244. The head-note to that case reads as follows:—

“The plaintiffs employed the defendant to prepare plans for a building to be erected on a site belonging to them. The defendant neglected to measure the site, and, acting on information which was unauthorised by the plaintiffs, prepared plans on the assumption that the site was smaller than it was in fact. The plaintiffs, having paid the defendant for the plans, were unable to raise funds to build on the site, and ultimately parted with it, and then discovered the error in the plans. In an action to recover the money paid for the plans on the ground of a total failure of consideration, or, in the alternative, for damages for negligence:—

“*Held*, that there had not been a total failure of consideration, but that as the defendant had been negligent the plaintiffs were entitled to damages, although, as they had sustained no loss from his negligence, those damages would be only nominal.”

The application of the rule to the case of solicitors is well illustrated by *Shaw v. Arden* (1832), 9 Bing. 287, where it is said:—

“In considering an attorney’s bill, the jury may discard an item for work entirely useless, though upon an item for work partly useless or in respect of which there has been any negligence, the client’s remedy is only by a cross-action” (head-note).

In that case, the plaintiff (client) sued the defendants (attorneys) for £19. The defendants pleaded a set-off of £21 for legal services previously rendered. The plaintiff denied the validity of the set-off, on the ground that the proceedings taken by the attorneys were useless, unnecessary, and improper. The jury found for the plaintiff, and this was a motion by the defendants for a new trial.

See also *Godefroy v. Jay* (1831), 7 Bing. 413; *Whiteman v. Hawkins* (1878), 4 C.P.D. 13; and *In re Massey & Carey* (1884), 26 Ch. D. 459.

The application of the rule to the case of an auctioneer is illustrated by *Denew v. Daverell* (1813), 3 Camp. 451.

Having regard to these authorities, I would hold:—

1. That this is not a case where the contractor has abandoned the contract *in medio* and left it wholly uncompleted. A complete appraisal report was furnished but erroneous in certain parts. Such cases as *Taylor v. Caldwell* (1863), 3 B. & S. 826, *Appleby v. Myers* (1866), L.R. 1 C.P. 615, and the recent decision of this Court in *Lester v. MacMaster* (1925), 28 O.W.N. 307, have therefore no application.

App. Div.
1925.

McGREGOR
AND
McINTYRE
Co. LTD.
v.
STERLING
APPRAISAL
Co. LTD.
Masten.
J.A.

App. Div.
1925.

McGREGOR
AND
McINTYRE
CO. LTD.
v.
STERLING
APPRAISAL
CO. LTD.
Masten,
J.A.

2. That the work done is not different from the work which the defendant contracted to do.

3. For reasons indicated throughout this judgment, I think the report is of benefit to the plaintiff; and, even if it were of no practical benefit, the plaintiff, by its election to retain it, has precluded itself from making such a contention.

I, therefore, agree with the principle on which the learned trial Judge proceeded, and with his allowance of \$350 damages in connection with that section of the report covering steel construction.

I think, however, that damages should also be allowed for the defects in that branch of the report which deals with the machinery. I am also of opinion that the errors which have been established in these two branches seriously weaken the evidentiary value of the whole report, and that damages on this score should also be awarded. On these grounds I would increase the damages already allowed by the sum of \$400, and thereby increase the plaintiff's judgment to \$500.

I have felt grave doubts on the question of costs. The appellant has framed its action, conducted the trial, and argued this appeal on a theory which, in my view, is wholly untenable. However, on the ground that the judgment below did not accord the appellant as much as it was entitled to have, and that the appeal has succeeded, costs of the appeal must follow the event.

Judgment below varied.

[ROSE, J.]

1925.

FROST STEEL AND WIRE CO. LTD. v. LUNDY.

June 29.

Trade Mark—Registration—Invalidity—Descriptive Design—Pictorial Representation—Mark Used in Connection with Sale of Goods of Particular Kind.

A word-mark consisting of words that are merely descriptive of the goods to which it is to be applied cannot validly be registered as a trade mark; and that well-settled rule is applicable also to a design-mark that is merely descriptive.

The plaintiffs manufactured wire fencing of various sorts, one being a kind made on a patented machine called the "Imbler," the patent for which was held by them. The patent expired in 1923; and in 1924 the plaintiffs registered a specific trade mark to be used in connection with the sale of wire fences. They described the mark as consisting of the representation of a wire knot; and the facsimile annexed to their declaration was a pictorial representation of the knot made by the "Imbler" machine:—

Held, that the registration of the mark as a trade mark for use in connection with the sale of wire fencing of the "Imbler" kind was invalid.

The mark was a mere pictorial naming of the goods.

Bowden Wire Ltd. v. Bowden Brake Co. Ltd. (1912-14), 30 R.P.C. 45, 580, 31 R.P.C. 385, referred to.

1925.

FROST
STEEL AND
WIRE CO.
LTD.
v.
LUNDY.

THIS was an action for an injunction to restrain the infringement of a registered trade mark and the passing off by the defendant of his goods as goods of the plaintiffs' manufacture, and for damages.

The action was tried by ROSE, J., without a jury, at a Toronto sittings.

Christopher C. Robinson, K.C., for the plaintiffs.

R. S. Robertson, K.C., for the defendant, referred to Kerly on Trade Marks, 5th ed., p. 217, and *In re James's Trade Mark* (1885), 31 Ch. D. 340.

June 29. ROSE, J.:—The plaintiff company was incorporated in 1916 and took over the business of the Frost Wire Fence Company, a company which for many years had been manufacturing wire fencing of various sorts, including a kind made on what is known as the Imbler machine, a patented machine, the Canadian patent for which was held by the Frost company until the incorporation of the plaintiff company and then by the plaintiff company.

One of the great distinctions between one make of wire fence and another is in the kind of knot tied in the wire by which the upright pieces are attached to the horizontal strands. The Imbler machine ties a knot which differs in appearance and—as is alleged in the advertisements—in effectiveness from other knots; and first the Frost company and afterwards the plaintiff company, in advertising their farm fencing, published a pictorial representation of this knot, sometimes by itself and sometimes as an enlarged "inset" in a picture of a section of the fence. These two manners of using the knot in advertisements are well illustrated by the cuttings from journals published in London and Winnipeg. There was also a representation of the knot on various price lists of goods manufactured by the Frost company, this use being similar to one of the uses that a manufacturer might make of a trade mark which he had adopted for use with all goods of his manufacture: that is to say, on these price lists, which gave the prices not only of fencing made on the Imbler machine but also of other articles manufactured by the Frost company, the picture of the knot was prominently displayed without anything to indicate that it was the

Rose, J.
1925.
FROST
STEEL AND
WIRE CO.
LTD.
v.
LUNDY.

knot used in some only of the fences listed. The plaintiffs also printed the picture on envelopes in which they sent out catalogues and advertisements of their products in general; and, I think, so far as use in advertising goes, they did with the mark practically what they would have done with a general trade mark. But neither the Frost company nor the plaintiffs ever applied the mark to any goods, and it had not become a trade mark before it was registered.

The Imbler patent expired in 1923, and thereafter any one who could procure one of the Imbler machines was free to make and sell in Canada fences of the kind of which the plaintiffs had had a monopoly. Some of such machines were for sale in the United States; the defendant was known to the president of the plaintiff company to be considering the advisability of commencing the manufacture of wire fences; and the plaintiffs decided to register the picture of the knot as a trade mark lest the defendant should decide to buy one of the Imbler machines and, in advertising the fence made with it, should use a similar picture. Accordingly they applied on the 28th January, 1924, for the registration of a specific trade mark to be used in connection with the sale of wire fence. The mark they described as consisting of the representation of a wire knot; and the facsimile annexed to their declaration was the picture which has been under discussion.

The defendant bought one of the machines late in 1923. With it there came to him some electro-plates shewing a section of fence made by the Imbler process with an enlargement of the knot inset, and a similar picture of the knot without any section of a fence but with the words "the knot without a rival." The defendant proceeded to make arrangements for manufacturing and selling the fence, and one of the first steps, taken in February, 1924, was to place his electro-plates in the hands of an advertising agency and to give instructions for the insertion of advertisements in many newspapers and trade journals. Some advertisements appeared in March, but it was not until April that any appeared in which the knot was shewn. When the knot was shewn it was called the "Lucky Tie," and the fence was described as "Lundy Fence—Lucky Tie" or "Lundy's Lucky Tie Fence."

Besides fences made on the Imbler machine, the defendant sells certain fence posts and certain gates and fences in which the Imbler knot is not used, and these articles appear in certain price lists which he has issued. On the front of the price lists are the words "Lundy" and "Fence" with a picture of the knot between them, and below the picture are the words "Lucky Tie etc." so that it is indicated clearly enough to readers of the list that the defendant is offering both fences of which the "lucky tie" is a

feature and fences of a different type, and that his illustration of the knot connected with the words "Lundy Fence—Lucky Tie" is published for the purpose of describing the one type of fence and not in any sense as a trade mark applicable to all his goods. None of the advertising affords any basis whatever for a suggestion that the defendant is trying to pass off any of his goods as goods manufactured by the plaintiffs. On the contrary, the fair meaning of every advertisement produced at the trial is that the defendant is offering a fence of his own manufacture, which he claims has the merit of being held together by his lucky tie. Therefore, if the plaintiffs are entitled to succeed, it must be on the ground that they have a trade mark validly registered and that the defendant has infringed it.

Many interesting questions as to the construction to be placed on sec. 13 and other sections of the Trade Mark and Design Act, R.S.C. 1906, ch. 71, were discussed at the trial. Among them are the questions whether the plaintiffs, who had not applied the mark to their goods in any way, were properly speaking the "proprietors" and so were entitled to apply for registration; and the question, suggested by *Linoleum Manufacturing Co. v. Nairn* (1878), 7 Ch. D. 834, and the many cases in which it has been applied, and by *Rubberset Co. v. Boeckh Brothers Co. Ltd.* (1919), 46 O.L.R. 11, as to whether the plaintiffs, by registering the mark after the expiration of their patent, could in effect prolong the monopoly which they had enjoyed while the patent was in force. With these questions, however, it is, in my opinion, unnecessary to deal; for it seems to me that it is clear that the mark, which is a mere description of the knot used in the Imbler type of fence, cannot be a valid trade mark for use in connection with the sale of fencing of that type, whatever may be said for it as a mark to be used in connection with the sale of other articles.

The defendant, admittedly, has the right to manufacture and sell fences made according to the Imbler process, and, in advertising his goods, to state that they are made in the way in which they are made and that they possess the characteristic features which they do possess. Admittedly, too, the best way of describing the knot is to publish a picture of it. That is what the plaintiffs have done and it is what was done by the former owners of the machine now owned by the defendant; and the defendant has merely used the kind of picture that was used by the former owners of his machine, substituting for the words, "the knot without a rival," by which those former owners called attention to the knot, words which he prefers, viz., "lucky tie."

That a word-mark consisting of words that are merely descrip-

Rose, J.

1925.

FROST
STEEL AND
WIRE CO.
LTD.
v.
LUNDY.

Rose, J.
1925.
FROST
STEEL AND
WIRE CO.
LTD.
v.
LUNDY.

tive of the goods to which it is to be applied cannot validly be registered is beyond controversy. There are, however, very few reported cases in which the Courts have had to consider the question whether a design-mark that is merely descriptive is capable of registration. But it is difficult to see why there should be any difference between the rules to be applied in the case of a design and those applied in the case of a word; and that there is no difference is assumed by Lord Justice Hamilton and Mr. Justice Swinfen Eady in *Bowden Wire Ltd. v. Bowden Brake Co. Ltd.* (1912-14), 30 R.P.C. 45 and 580, 31 R.P.C. 385. The mark in that case was a piece of Bowden wire in a particular form, displayed in a particular manner, with the ends of the inextensible wire projecting beyond the tube. It was registered for motor cycle brakes and cycle accessories. The wire (which had been the subject of a patent held by the plaintiffs) might or might not be used in the manufacture of the articles in connection with which the mark was registered, and Mr. Justice Swinfen Eady, the trial Judge, disposed of the point now under consideration by saying that the mark was registered for a large class of articles and the device was not a representation of any article as sold but a fanciful representation of a piece of the wire in a particular shape and displayed in a particular manner (30 R.P.C. at p. 61). In the Court of Appeal, Lord Justice Hamilton put it that the mark was not "a mere pictorial naming of the goods manufactured instead of using the language"—that there was "a sufficient amount of device about it" to warrant registration (30 R.P.C. at p. 596). The decision of the House of Lords does not touch this question. In the present case the mark registered is, as it appears to me, "a mere pictorial naming of the goods;" it is a picture of the knot, with just so much shewn of the two pieces of wire around which the knot is tied as is necessary to enable one to see how the tie-wire binds those two pieces together. It is true that the picture is not as good a picture as that used by the plaintiffs in their printed advertisements and price lists; but that seems to be because the draughtsman was not quite as successful as the maker of the plates used in producing the printed matter. It would be difficult, perhaps, for a person to bend a piece of wire into the shape which the tie-wire takes in the fence if he had seen nothing but the trade mark, whereas a skilled person with one of the printed pictures before him might succeed; but it appears to me upon a comparison of the printed matter with the trade mark that the draughtsman who prepared the application for the trade mark was copying from the advertisements as closely as he could, and that it is a mistake to describe his work—as Mr. Robinson does—as a highly convention-

alized representation of the knot. The mark appears to me to be a representation of the knot, not as clear as a reproduction of a photograph would be, but still a fairly good representation, and nothing else; and, indeed, the evidence is that the pictures which the plaintiffs used in their printed publications were intended to shew prospective purchasers how the fence was made up, and that the trade mark was registered for the purpose of obtaining a monopoly of the use of such pictures.

For these reasons, I am of opinion that the registration of the mark as a trade mark for use in connection with the sale of wire fence of the Imbler kind was invalid, and that the action fails. It is unnecessary to consider whether the registration is valid for any other purpose, or what the result might have been if the defendant had been using or threatening to use the mark in connection with the sale of articles of which it is not descriptive.

The action will be dismissed with costs.

Rose, J.
1925.
FROST
STEEL AND
WIRE CO.
LTD.
v.
LUNDY.

[WRIGHT, J.]

MARTIN V. CLARKSON.

1925.
July 7.

Bankruptcy—Incorporated Company—Debentures—Sale and Delivery to Purchaser before Filing of Prospectus—Ontario Companies Act, secs. 101(1), 105—Judgment for Enforcement of Charge Created by Debentures—Questioning Validity of Debentures—Qualified Right of Unsecured Creditors—Authorised Trustee in Bankruptcy—Estoppel—Validity of Debentures in Hands of Purchaser and Assign.

B., the holder of two debentures of a company incorporated under the Ontario Companies Act, in an action against the company, brought by him on behalf of himself and all other holders of the company's debentures, obtained on the 24th July, 1924, a judgment declaring him entitled to a charge upon the undertaking of the company and upon all its property for the payment of the moneys secured by the two debentures, and directing a sale of the assets of the company, with the usual provision for a reference to take the accounts and make inquiries. By clause 14 of the judgment it was provided that any unsecured creditor of the company should be at liberty, in the reference directed but not otherwise, to contest the validity of the debentures:—

Held, that the authorised trustee in bankruptcy of the estate of the company was, in an action brought by him, estopped by the judgment in B.'s action from contesting the validity of the debentures.

Semble, that if B. (or his assigns) were seeking to establish in the bankruptcy proceedings a claim upon the debentures, the authorised trustee would be in a position to contest the judgment debt.

Clause 14 of the judgment could not be construed as permitting unsecured creditors to contest the validity of the debentures in any proceedings other than the reference directed by the judgment.

1925.

MARTIN
v.
CLARKSON.

2. The debentures were valid in the hands of B. notwithstanding that the company had not filed a prospectus before the issue of the debentures: secs. 101 (1) and 105 of the Ontario Companies Act. Having regard to the provisions of that Act, decisions under the English Act declaring that non-compliance with the requirements of similar sections renders the debentures void are not applicable in Ontario. Persons lending money to a company have a right to assume that the essentials of internal management have been carried out by the company.
3. If the debentures were not valid in the hands of B., they were valid in the hands of his pledgee to whom he assigned them.

SPECIAL case.

June 29. The case was heard by WRIGHT, J., in the Weekly Court, Toronto.

F. H. Phippen, K.C., for the plaintiff, trustee in bankruptcy of the estate of the Mechanical Trades Company Limited.

A. J. Thomson, for the defendant the Bank of Nova Scotia.

A. B. Mortimer, for the defendant Clarkson, trustee in bankruptcy of the estate of Arthur Hamilton Britton.

July 7. WRIGHT, J.:—The facts which gave rise to the contest are briefly as follows. On or about the 30th May, 1921, one Arthur Hamilton Britton purchased two debentures of \$5,000 each, issued by the Mechanical Trades Company Limited. By these debentures the company purported to charge its undertaking and all its property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled capital. The said company had not at the time of the issue and delivery of such debentures filed a prospectus, or statement in lieu of prospectus, with the Provincial Secretary of Ontario, but the company did file a statement in lieu of prospectus on the 19th June, 1923. The special case states that the failure of the company to file a prospectus, or statement in lieu thereof, was not known to the said Arthur Hamilton Britton.

Subsequent to the purchase of the said debentures, the said Arthur Hamilton Britton, who was then indebted to the defendant the Bank of Nova Scotia, pledged one of the said debentures on the 26th October, 1923, and the other of the said debentures on the 23rd November, 1923, to the said bank, upon the usual terms and in the usual form used by banks for such purpose.

It is admitted that the bank had no knowledge of the failure of the company to file a prospectus, or statement in lieu thereof, before the issue of such debentures.

On the 24th April, 1925, the said Arthur Hamilton Britton

made an authorised assignment under the Bankruptcy Act to the defendant Clarkson.

The special case states as an admission by all the parties that the said Arthur Hamilton Britton has made default in the payment of his indebtedness to the Bank of Nova Scotia, and by reason thereof the said bank has become entitled to proceed to realise under the terms of the pledging agreements upon the securities held by it, including the two debentures already referred to.

On the 19th July, 1924, the said Arthur Hamilton Britton, on behalf of himself and all others the holders of the debentures of the defendant company, commenced an action in this Court against the company, and on the 24th July, 1924, judgment was pronounced in the said action, whereby, among other things, it was declared that the said Arthur Hamilton Britton "is entitled to a charge upon the undertaking of the defendant and upon all its property, real and personal, rights, powers, and assets of every kind and description, present and future, including its uncalled for capital, as the same is covered by the debentures of the defendant (Mechanical Trades Company Limited) dated the 30th day of May, 1921, in question in this action, for the payment of the moneys secured thereby." The said judgment further directed a sale of the assets of the company, with the usual provisions as to a reference to take the accounts and to make inquiries.

In clause 14 of the said judgment it is provided as follows: "This Court doth further order that any unsecured creditor of the defendant shall be at liberty at his own expense to attend upon and take part in the reference directed by this judgment, and in particular, in the said reference *but not otherwise*, to contest the priority of the said debentures if he so desires."

By an order of Mr. Justice Fisher, made on consent of the parties to the said action, the word "priority" in para. 14, already cited, was struck out and in lieu thereof the word "validity" was inserted.

By another clause of the same order, leave was given to the present plaintiff, with the written consent of the inspectors of the estate of the said company, to commence an action against the said Arthur Hamilton Britton to contest the validity of the debentures in question, but this last-mentioned clause was not consented to by the other parties to the motion. The order in question was made in the bankruptcy proceedings then being carried on in connection with the estate of Mechanical Trades Limited, as well as in the action in which judgment had been recovered by the said Arthur Hamilton Britton.

Wright, J.

1925.

MARTIN
v.
CLARKSON.

Wright, J.

1925.

MARTIN

v.

CLARKSON.

The questions submitted for the opinion of this Court are:—

(a) Is the plaintiff estopped by the judgment of the 24th July, 1924, from contesting the validity of the debentures issued by the company?

(b) If the plaintiff is not so estopped, were the said debentures valid in the hands of the said Arthur Hamilton Britton? and

(c) If not valid in his hands, are the said debentures valid in the hands of the Bank of Nova Scotia as the pledgee as aforesaid?

The answer to the first question involves the consideration of the question as to whether the plaintiff, as authorised trustee of the estate of Mechanical Trades Limited, has any higher rights than that company would have. In certain cases it is quite clear that the trustee in bankruptcy is not bound to regard as final a judgment obtained against the debtor, but these are cases in which a judgment creditor seeks to establish his claim in the bankruptcy proceedings either by obtaining a receiving order or proving his claim as a judgment creditor. See *Ex p. Revell, In re Tollemache* (1884), 13 Q.B.D. 720; *Ex p. Anderson, In re Tollemache* (1885), 14 Q.B.D. 606.

In Williams on Bankruptcy Practice, 12th ed., p. 56, it is stated that the validity of the judgment debt will be inquired into only when there is evidence of fraud or collusion or a miscarriage of justice or when there is no good petitioning creditor's debt irrespective of the judgment.

In Halsbury's Laws of England, vol. 13, para. 478, it is stated to be the law that a judgment *inter partes* raises an estoppel only against the parties to the proceeding in which it is given, and their privies, that is, those claiming or deriving title under them, and the privies are divided into three classes: (1) privies in blood, (2) privies in law, and (3) privies in estate. Among the privies in law are said to be the bankrupt and trustee in bankruptcy.

In the present case it will be noted that the judgment creditor, Arthur Hamilton Britton, and his assign, the Bank of Nova Scotia, are not seeking to prove the claim upon the debentures in the bankruptcy proceedings—in fact, they claim paramount thereto, so that the decisions which justify a trustee in bankruptcy in inquiring into and contesting the judgment debt are not applicable.

I am not overlooking the provisions of the order which enable the unsecured creditors to contest the validity of these debentures, but I am of the opinion that if any contest is permitted it must be in strict compliance with the terms of the order which restricts such right to proceedings in the reference, and not otherwise.

The judgment in question contemplated a speedy and final disposition of any claim the unsecured creditors might set up to the effect that the said debentures were invalid, and it was not then contemplated that these creditors should be permitted to contest the same in other proceedings.

Wright, J.
1925.
MARTIN
v.
CLARKSON.

So far as this special case is concerned, I think it should be determined as if para. 14 of the judgment were omitted. I am of opinion that the answer to the first question must be in the affirmative.

In view of the answer to question (a), it is not strictly necessary for me to consider what the answer to question (b) should be; but, in view of further proceedings, I think it well to state my opinion in regard to the points involved in question (b).

Under sec. 101(1) of the Ontario Companies Act, a company incorporated thereunder is prohibited from issuing debentures, etc., until a prospectus has been filed. Under sec. 105, in case the directors fail to file a prospectus before issuing debentures they are subject to certain penalties. This distinguishes the Ontario Act from the English Companies Act, and in my view the decisions under the English Act declaring that non-compliance with the provisions of similar sections render the debentures void do not apply here.

Mr. Phippen relied strongly on the judgment of Mr. Justice Middleton in *Premier Trust Co. v. Raymond* (1922), 52 O.L.R. 533, where that learned Judge followed the decision in *In re Blair Open Hearth Furnace Co. Ltd.*, [1914] 1 Ch. 390. On appeal (*Premier Trust Co. v. Raymond* (1923), 55 O.L.R. 30) the judgment of Mr. Justice Middleton was set aside and a new trial ordered, so that the decision in that case is not binding upon me as such, but is extremely valuable as an opinion given by a learned and experienced Judge. The authority of the case upon which Mr. Justice Middleton based his judgment has been much shaken by the decision of the Judicial Committee of the Privy Council in *Official Receiver and Liquidator of Jubilee Cotton Mills Ltd. v. Lewis*, [1924] A.C. 958, and it is questionable if that case can now be regarded as authority. I think the authorities are unanimous in holding that persons lending money to a company have a right to assume in such a case that the essentials of internal management have been carried out by the borrowing company: see *Royal British Bank v. Turquand* (1856), 7 E. & B. 327; *Fountaine v. Carmarthen Railway Co.* (1868), L.R. 5 Eq. 316; *In re Romford Canal Co.* (1883), 24 Ch. D. 85, particularly the judgment of Kay, J., at p. 92.

Wright, J. The answer to question (b) will therefore be in the affirmative.
 1925.

MARTIN
 v.
 CLARKSON.

I am also of the opinion that the answer to question (c) should be in the affirmative, as the authorities would appear to establish that the holders of debentures purchased or acquired from the party to whom the same were issued occupy in many respects a higher position than does the immediate holder: see *Webb v. Commissioners of Herne Bay* (1870), L.R. 5 Q.B. 642.

[MOWAT, J.]

1925.

RE GAMBLE.

July 8.

*Executors — Devastavit — Failure to Insure Buildings — Negligence—
 Liability—Appeal—Costs.*

In Ontario executors are bound to insure against fire buildings forming part of the estate in their hands, and are liable on a *devastavit* if they fail to insure.

English cases such as *Re McEacharn* (1911), 103 L.T.R. 900, and *Bailey v. Gould* (1840), 4 Y. & C. Ex. 221, not followed.

Duties of trustees considered.

An appeal from an order of a Surrogate Court Judge was dismissed, and no order was made as to costs except that the costs of the Official Guardian, representing interested infants, should be paid out of the estate.

APPEAL by the executors of one Gamble, deceased, under sec. 34(5) of the Surrogate Courts Act, from an order made by the Judge of the Surrogate Court of the County of Simcoe upon passing the executors' accounts.

The appeal was heard by MOWAT, J., in the Weekly Court, Toronto.

W. A. Boys, K.C., for the executors.

F. W. Harcourt, K.C., Official Guardian, representing infants who were interested.

July 8. MOWAT, J.:—The point involved is the liability of executors on a *devastavit*, in not insuring the farm buildings of the estate. The Surrogate Court Judge, when passing their accounts, surcharged the executors with \$1,800 loss by fire.

The old country cases, *Re McEacharn* (1911), 103 L.T.R. 900 (Eve, J.), *Bailey v. Gould* (1840), 4 Y. & C. Ex. 221 (Alderson, B.), which decided that executors are not bound to insure the estate, should not be followed in this country, and need not be.

not being judgments of the Court of Appeal in England: *Trimble v. Hill* (1879), 5 App. Cas. 342. For United States cases see Wid-
difield on Executors' Accounts, 2nd ed. (1919), p. 153 *et seq.*

It is the custom in this country to insure, and failure to do so is negligent conduct on the part of executors. The testator himself had insured. The executors knew this—they carelessly allowed the insurance to lapse. They are liable not for damages, but as for a debt owing to the estate, just as they would be liable for delay which would enable the Statute of Limitations to be pleaded, or for not realising assets at a proper time whereby loss is occasioned, or by allowing beneficiaries to waste property instead of realising it, or by allowing debts bearing interest to run on where there were assets sufficient to discharge them, or allowing the goods of the estate to be lost, or neglecting to invest unneeded balances: Ingpen on Executors and Administrators, 2nd ed. (1914), p. 655.

A trustee's duty is not to take such care only as a prudent man would take if he had himself alone to consider; but rather to take such care as an ordinary prudent man would take if he were minded to provide against loss to people for whom he felt morally bound to provide. And here there were infants to be maintained and educated.

The Court is unwilling to make the position of executors any more onerous than necessary, so that neighbours may be unwilling to accept such trusts; on the other hand, they know that persons occupying these positions receive remuneration—generally on a liberal basis—and it is important that they should understand that negligent conduct in their office will not be permitted.

The appeal is, therefore, dismissed. No order as to costs, except that the Official Guardian's costs will be paid out of the estate: *In re Skinner*, [1904] 1 Ch. 289; *Story v. Dunlop* (1867), 13 Gr. 375.

Mowat, J.
1925.
RE GAMBLE.

[IN BANKRUPTCY.]

RE HUDSON FASHION SHOPPE LTD.

1925.

July 9.

Bankruptcy—Sale of Goods to Debtor in Ontario by Vendor in Quebec—Place of Contract—Orders Obtained in Ontario by Agent of Vendor—Acknowledgment—Acceptance—Departure from Contract—Deliveries in Instalments—Attempt by Vendor to Cancel Sale and Recover Goods from Trustee—Revendication—Resiliation—Quebec Civil Code, art. 1543.

The agent of a manufacturing company carrying on business in Montreal, in the Province of Quebec, obtained from retail merchants doing

Fisher, J.
—
1925.
—
RE HUDSON
FASHION
SHOPPE
LTD.

business in Ontario orders for goods to be delivered to the purchasers f.o.b. Montreal. On each of the orders there was printed, "This order is subject to the approval of the firm." The orders were sent to the manufacturers in Montreal, and were acknowledged by cards sent to the purchasers, in which it was stated that the orders would receive prompt attention. Goods were delivered in instalments to the purchasers in Ontario. Three days after the last delivery, the whole of the goods not having been delivered, the purchasers were declared bankrupt. All goods not sold by the purchasers being in possession of the trustee in bankruptcy, the vendors demanded the return of those received within 30 days of the insolvency, taking the position that the contract was made in Quebec and that the law of that Province was applicable thereto, and invoking the provisions of art. 1543 of the Civil Code of Quebec:—

Held, that the contract was not in its entirety made in the Province of Quebec.

The purchasers, notwithstanding that they accepted the goods when delivered in instalments, were always in a position to accept or reject in Ontario.

Where manufacturers or wholesale merchants in Quebec sell and deliver goods to a purchaser in Ontario, to be carried by him into his stock and to be sold in the ordinary course of business, the terms of sale being silent as to the application of the Civil Code, and nothing being done by way of registration in Ontario under the Conditional Sales Act or Bills of Sale and Chattel Mortgage Act, there is no right of resiliation under art. 1543 if within 30 days after the delivery the purchaser becomes bankrupt.

Review of the authorities.

MOTION by the Royal Dress Company Ltd., of Montreal, for an order and judgment annulling and resiliating for all purposes, as of right, the sale by the applicants to the debtor-company of certain merchandise and for the immediate return and delivery thereof to the applicants.

The motion was heard by FISHER, J.

S. J. Birnbaum (with him *J. Shapiro* of the Montreal Bar),
for the applicants.

L. M. Singer, for the trustee.

S. H. Bradford, K.C. (*J. H. Greenberg* with him), *amicus curiæ*.

B. Luxenberg, for the debtor-company.

July 9. FISHER, J.:—The questions for determination are of very great importance to the commercial community both in Ontario and Quebec, and to the whole Dominion.

The facts are as follows:—

The Hudson Fashion Shoppe Ltd., an incorporated company carrying on retail business in Hamilton and in London, Ontario, were approached by a traveller representing the Royal Dress Company, who are manufacturers carrying on business in Montreal, for

orders for goods. Two orders were obtained. These orders were sent by the traveller, Felsen, to his employers in Montreal.

The Hamilton order is dated the 17th April, 1925, and the London order is dated the 22nd April, 1925.

The goods for Hamilton were to be shipped "on or about 3 to 4 weeks" and for London "at once, complete May 20, sure."

On both order forms there is printed: "This order is subject to approval of the firm."

When the Montreal firm received the orders, it is admitted, they sent a printed card to both the Hamilton and London establishments. This card was a simple acknowledgment of the receipt of the orders from the traveller, and the card stated that the "same will receive our usual prompt attention." No further correspondence followed.

Goods to the value of \$160.13 were invoiced and sent to the Hamilton shop on the 29th April, 1925; on the 30th April, goods to the value of \$356.21 were invoiced and sent to the London shop; on the 1st May, goods to the value of \$101.59 were invoiced and sent to the Hamilton shop; and on the same date to the London shop, \$136.24; on the 5th May, to the London shop, \$189; on the same date, to the Hamilton shop, \$137.29; on the 7th May, to the London shop, \$252.53; on the 8th May, to the Hamilton shop, \$257.25; on the 9th May, to the London shop, \$138.60; on the 19th May, \$504 to the London shop; and on the same date to the Hamilton shop, \$221.03.

Invoices covering these deliveries were put in. The goods were to be delivered to the purchasers f.o.b. Montreal, and all express charges were payable by them. It is admitted that the goods referred to in the invoices reached the purchasers at Hamilton and London, and by them were placed with their general stock in their respective stores.

On the 22nd May, 1925, an interim receiver in bankruptcy was appointed under an order of the Court, and he took possession of both shops on the 23rd May, 1925, and thereafter a final receiving order was made on the 1st June, 1925. The creditors thereafter appointed a trustee and inspectors. All goods not sold by the purchasers are now in the possession of the trustee.

Drafts were drawn by the vendors on the purchasers for the goods as invoiced and delivered, and these drafts were accepted payable at the purchasers' bank in Ontario.

Representatives of the Montreal firm, hearing of the bankruptcy proceedings, immediately visited Hamilton and London and made oral demands, and thereafter written demands, on the interim receiver for a return of all the goods received from the vendors

Fisher, J.

1925.

RE HUDSON
FASHION
SHOPPE
LTD.

Fisher, J.
1925.

RE HUDSON
FASHION
SHOPPE
LTD.

within 30 days of the insolvency. The interim receiver, and afterwards the trustee, refused to comply with the demands made.

It is in evidence that inventories were taken of the goods now in question, and these goods have been set aside, awaiting the result of this motion.

Counsel for the claimants (applicants) contend that the orders taken for goods were to be accepted in Montreal, that they were accepted in Montreal, and that therefore the contracts were made in Quebec, and that the law of that Province is applicable thereto under art. 1543 of the Civil Code of Quebec, which reads:—

“In the sale of movable things *the right* of dissolution by reason of non-payment of the price can only be exercised while the things sold remain in the possession of the buyer, without prejudice to the seller's right of revendication as provided in the title *Privileges and Hypothecs*. In the case of insolvency such right can only be exercised during the 30 days *next after delivery*.”

In support of this contention counsel referred to *In re Rosenzweig* (1920), 1 C.B.R. 431; *Bigelow v. Craigellachie Glenlivet Distillery Co.* (1905), 37 Can. S.C.R. 55; *Rhode Island Locomotive Works v. South Eastern Railway Co.* (1886), 31 L.C. Jur. 86; *Rogers v. Mississippi and Dominion Steamship Co.* (1888), 14 Q.L.R. 99; Halsbury's Laws of England, vol. 6, p. 239, para. 357; and *In re Komer* (1925), 5 C.B.R. 515, 27 O.W.N. 467.

The learned counsel for the claimants also argued that under a contract for the sale of the goods made in Quebec the vendor was entitled, under art. 1543, *supra*, even notwithstanding the removal of the goods to another Province, as against the purchaser or the trustee in bankruptcy of the purchaser, to a return of the goods sold for non-payment, if insolvency intervened within 30 days after delivery, and also that whatever liens or rights were attached to the goods at the time of sale under the Quebec Code before their removal from the Province of Quebec remained, no matter in what country they were found; that the vendors were secured creditors within the meaning of sec. 2 (*gg*) of the Bankruptcy Act, and the goods did not vest in the trustee; and also that the debtor held the goods in trust, and under sec. 25(1) the trustee obtained no title thereto.

Counsel for the trustee contends that the contract was not in fact made in the Province of Quebec; that the Civil Code of Quebec has no application to goods that have been sold and delivered to a purchaser in the Province of Ontario; that the post-card was not an unconditional acceptance of the order, and therefore there was no binding contract entered into in Montreal; that the subsequent shipments in instalments of the goods must be considered as the

beginning of new contracts and constitute new offers; and that, as the new offers were communicated to the purchasers in Ontario by the delivery of the goods, and the right to rejection and payment was in Ontario, the contracts were in fact made in Hamilton and London; and the provisions of the Quebec Code could not be applied.

Fisher, J.
1925.
RE HUDSON
FASHION
SHOPPE
LTD.

It may be observed in passing that in Ontario an unpaid vendor's rights are defined by sec. 31 of the Sale of Goods Act, 10 & 11 Geo. V. ch. 40 (1920), and that in Quebec they have no such Act.

The two main points for determination are: (a) was the contract made in Quebec, and (b), if made in Quebec, do the terms of the Civil Code of that Province extend to the Province of Ontario and prevail against the trustee in so far as these goods are concerned?

The contract here was an entire contract for the sale and purchase of a quantity of goods and no less, and complete delivery by the sellers was a condition precedent to the buyers' obligation to accept and pay. The vendors, instead of fulfilling the contract as made, undertook to deliver the goods by instalments, and made the price of these instalments payable separately by the drawing of drafts on the purchasers. This was not the contract which the claimants are now alleging was accepted in Quebec. This was a substitution on their part, and the purchasers, notwithstanding that they did accept the instalments, were always in a position to accept or reject in the Province of Ontario.

I do not see how these post-cards can be considered unconditional acceptances, as they simply acknowledge receipt of the orders and state that they "will receive our . . . attention." There was no implication or promise to comply with the terms of the orders. An acceptance must be unambiguous and unconditional. See Pollock on Contracts, 9th ed., p. 52. I think it must be conceded that if the vendors, after these cards were sent, had refused to send on the goods, neither the vendors nor the purchasers could have enforced the contract, because there had been no unconditional acceptance. Then what took place was that, without permission of the purchasers, the vendors undertook to alter the terms of the orders by sending on the goods in instalments; and, in addition, the fact is, that the vendors did not, before the insolvency of the purchasers, complete the whole contract by making delivery of all the goods purchased under either order. Can it be said that the contract was in its entirety made in Quebec?

In *Harvey v. Facey*, [1893] A.C. 552, the appellants telegraphed: "Will you sell us P.H.P. Telegraph lowest cash price."

Fisher, J. The respondents telegraphed in reply, "Lowest price for P.H.P. £900;" and then the appellants telegraphed: "We agree to buy P. H.P. for . . . £900 asked by you. Please send us your title deed in order that we may get early possession." They received no reply. It was held that there was no contract, as the final telegram was not the acceptance of the offer to sell, for none had been made. The acceptance must be expressed and not implied.

RE HUDSON
FASHION
SHOPPE
LTD.

See also *Little v. Hanbury* (1908), 14 B.C.R. 18. In that case the defendant telegraphed: "Propose to go in from Alert Bay over to the West Coast of Island hunt elk; guarantee one month's engagement at least from arrival here; take earliest date you could arrive here; Paget recommends; state terms; wire reply." The plaintiff telegraphed, "Five dollars per day and expenses;" whereupon the defendant telegraphed: "All right; please start on Friday." This was held, on the authority of *Harvey v. Facey, supra*, not to be a contract, as the offer to go at \$5 a day was merely a quotation, and not an acceptance.

See Benjamin on Sale, 6th ed., p. 105.

My finding is that the contracts were not made in Montreal. If, however, I am wrong in assuming that the contracts were not made in Montreal, then the question for determination is: Is the Civil Code of Quebec, in the circumstances of this case, operative in Ontario?

It is to be observed that the contracts or orders contain no reference to the Code, and on the evidence it was not proved that the purchasers knew that such a Code existed, and a fair inference is that they did not know, and if they did not know, I fail to see how art. 1543 can be read into and form part of a contract for the sale and delivery of goods to a purchaser resident in the Province of Ontario without having been agreed upon between the parties.

It seems to me that it might just as well be said that if France had a similar Code and goods were there sold and delivered to a purchaser in Ontario, and bankruptcy intervened within 30 days after the goods had been actually delivered into the possession of the purchaser in Ontario, as against the purchaser's trustee in bankruptcy the vendor could take possession of these goods.

The present case may be designated as one grounded on contracts made between parties carrying on business in different places under different systems of law; and, in cases where there has been no express agreement or intention as to which law shall govern a contract, the rule seems to be that the law of the Province or country with which the transaction has the nearest connection is to be applied. See *South Africa Breweries Ltd. v. King*, [1900] 1 Ch. 273.

The *Bigelow* case, *supra*, relied on by counsel for the claimants, is of no assistance, as that was an action to recover the amount due for goods sold, and the *lex loci contractus* was applied. The present case concerns the physical possession of goods sold, and therefore the law of the *situs* is of importance.

In this case, when the sale was made the vendors not only knew that the goods were to go to a purchaser in Ontario, but, by the delivery f.o.b. Montreal, they were instrumental in sending them there; they knew that the purchasers were to be considered the owners with an absolute right to sell in the ordinary course of business, that they could mortgage or encumber the goods according to the laws of that Province, and that they were even liable to taxation there. In such circumstances, I think there can be no question but that the vendors impliedly submitted to the laws in force in Ontario, where the goods were to be located, as it could not be expected that the rights of persons in the place where the goods are situated should be affected by the laws of the Province where the goods were sold. See Dicey, *Conflict of Laws*, 3rd ed., p. 573; *Re Barrett* (1880), 5 A.R. 206, 214; and *River Stave Co. v. Sill* (1886), 12 O.R. 557.

Lord Herschell, L.C., in *Hamlyn v. Talisker Distillery*, [1894] A.C. 202, 207, and Lord Watson, at p. 212, held that it was necessary to take into consideration what was the intention of the parties when the contracts were made and apply the law accordingly.

Dicey, in his 3rd ed., p. 607, says:—

“When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.”

And the same author at p. 590 says:—

“But the answer to the question whether a given agreement is to be considered an English contract or a French contract, though in the eyes of English Judges it does not depend exclusively upon any one circumstance (e.g., the place where the contract is made, or the place where the contract is to be performed), does depend upon the intention of the parties as to the law by which the contract is governed, or, in other words, upon the proper law of the contract.”

Westlake, in his *Private International Law*, 6th ed., p. 181, says:—

“In all these cases the law of the place where the movables are actually found must be applied.”

Fisher, J.

1925.

RE HUDSON
FASHION
SHOPPE
LTD.

Fisher, J.

1925.

RE HUDSON
FASHION
SHOPPE
LTD.

In *Inglis v. Robertson*, [1898] A.C. 616, it was held that the *situs* of the goods governed. That was a case where an Englishman had goods stored in a Glasgow warehouse and held a warehouse receipt. Desiring to borrow money, he endorsed this warehouse receipt to a money-lender in England and obtained a loan from him. The letter of hypothecation stated that part of the goods were deposited as security. No notice was given to the warehouse-keeper by the money-lender. Execution creditors of the Englishman seized the goods in the possession of the warehouse-keeper. An action was then commenced in Scotland, and on these facts it was held by the House of Lords that the right of the pledgee in the goods was defeated by the seizure and that the law of Scotland governed, as the warehouse-keeper had not been notified.

See also *Linderme Machine Works Co. v. Kuntz Brewery Ltd.* (1921), 21 O.W.N. 51. That was an action to recover the balance of the price of a machine sold to the defendants, or for a return of the machine. The plaintiffs were manufacturers in Detroit, Michigan, the defendants were brewers in the county of Waterloo, Ontario, and the contract was for the erection of machinery in the defendants' brewery in Waterloo. It was contended for the plaintiffs that the contract was made in Michigan and that the rights of the parties were governed by the law of Michigan. Orde, J., held that it was immaterial whether the contract was made in Michigan or in Ontario. The real point was, what was the proper law of the contract? It is that which governs the rights and obligations of the parties; and, while the law of the place where the contract was made is *primâ facie* the proper law of the contract, that is merely a presumption arising in the absence of anything in the contract indicating an intention or giving rise to a presumption that the law of some other country is to govern. In that case the learned Judge held that, the place of performance of the contract being in Ontario, the law of Ontario must be presumed to be the law which the parties intended to govern the contract. See also *McKenna v. Prieur and Hope* (1924), 56 O.L.R. 389.

According to art. 1543, the right to resiliate is conditional, and exercisable only within 30 days after delivery, but the right does not come into existence until after the bankruptcy of the purchaser, and to give effect thereto in this case would be to deprive creditors in Ontario or elsewhere of their right to participate *pari passu* in the distribution of an insolvent's estate as defined by sec. 54(4) of the Bankruptcy Act. The law is well settled that any agreement entered into between a debtor and creditor in which it is stipulated that in the event of bankruptcy the creditor is to obtain an advantage or that certain property shall belong to him,

thereby preventing the debtor's property from being distributed under the Bankruptcy Act, is contrary to the scope and policy of the Act, and is void. In all such cases the trustee—in all the common law Provinces of the Dominion—holds a higher position than that of the debtor and is not bound by or to give effect to such agreements. See *Ex p. Mackay* (1873), L.R. 8 Ch. 643, and *In re Jackson & Bassford Ltd.*, [1906] 2 Ch. 467.

So far as the creditors in Ontario or elsewhere of the purchaser are concerned, the sale, subject to art. 1543, was in the nature of a secret agreement between the vendors and the purchasers. These creditors, whether they carried on business in British Columbia or in any of the other Provinces of Canada, except Quebec, extending credit to the purchasers, were entitled to rely on the registration of documents under the Conditional Sales Act or Bills of Sale and Chattel Mortgage Act (in this Province, chs. 135 and 136, R.S.O. 1914) to ascertain who were the secured creditors of the debtors; and, if the claimants in this case are to succeed, these statutes are nugatory.

If merchants in Quebec sell and deliver goods into the possession of a purchaser in Ontario, to be carried by him into his stock and to be sold in the ordinary course of business, and the terms of sale are silent as to the provisions of the Code applying, and nothing is done by way of registration in this Province under the Conditional Sales Act or Bills of Sale and Chattel Mortgage Act, I am of opinion that there is no right of resiliation under the Code, if within 30 days after the delivery the purchaser becomes bankrupt. Vendors of goods everywhere have a common law right to stoppage *in transitu* in the case of insolvency.

In the *Rosenzweig* case, *supra*, all the parties to the contract resided in Quebec; the goods were delivered to a purchaser in Quebec; and the insolvency took place there. It was not the case of applying the Code to another Province. The learned Judge (Panneton, J.) held that the sale was in effect a conditional one; that the purchaser was not the absolute owner; that the vendor was a secured creditor; that, if the vendor exercised his rights under the Code upon insolvency of the purchaser, the ownership of the goods reverted to him; and that the provisions of the Bankruptcy Act did not apply and the property did not vest in the trustee.

The learned Registrar's judgment in the *Komer* case was based on the assumption that the contract was made in Quebec, and he followed the *Rosenzweig* case.

On all the evidence and material, I hold that the whole contract

Fisher, J.

1925.

RE HUDSON
FASHION
SHOPPE
LTD.

Fisher, J. was not made in Quebec, and that the Code, as applied to the facts in this case, is not effective or operative in Ontario.

1925.

There will be judgment in favour of the trustee, with costs.

RE HUDSON
FASHION
SHOPPE
LTD.

[ROSE, J.]

1925. TORONTO FINANCE CORPORATION LTD. AND COOK V. BANKING SERVICE CORPORATION LTD.
July 20.

Company—Issue of Common Shares to Promoter as Paid-up Shares—Issue at a Discount—Consideration—Services to be Performed—Inadequacy—Contract Made with Provisional Directors—Ratification by Permanent Directors and Shareholders—Judgment Declaring Contract ultra Vires—Release of Promoters from Performance of Services—Joinder of Shareholder as Co-plaintiff with Company—Unnecessary Party—Costs.

The defendants organised and procured the incorporation of the plaintiff company under the Ontario Companies Act, and made an agreement with the original directors, who had no substantial interest in the plaintiff company but were merely the nominees of the defendants, that, as consideration for services which they promised to perform, the defendants should receive practically the whole of the common shares of the capital stock of the plaintiff company as fully paid shares:—

Held, that the transaction was *ultra vires* of the plaintiff company, and was not validated by its ratification by the permanent directors and by the shareholders.

The shares were issued to the defendants at a discount, the value of the services to be rendered being much less than the par value of the shares.

The rule established by *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 124, and other English cases, that the issue of shares at a discount is *ultra vires* of a company whose capital is divided into shares of a fixed amount, and the liability of the shareholders of which is limited to the amount unpaid on their shares, applied.

Hood v. Caldwell (1922), 50 O.L.R. 384 and [1923] S.C.R. 488, followed. The plaintiff company was entitled to a judgment declaring that all its common shares for which no certificates had been issued to persons other than the defendants were unissued, and that the register of shareholders should be amended accordingly, and ordering the delivery up for cancellation of a certificate issued to the defendants for a certain number of shares.

Semble, that the defendants were entitled, in view of the plaintiff company's judgment, to a declaration that their obligations under the agreement were at an end.

The joinder as a co-plaintiff with the company of a shareholder suing on behalf of himself and all other shareholders was unnecessary and should be visited with costs.

In this action the plaintiffs, the Toronto Finance Corporation Limited and A. E. Cook, the latter suing on behalf of himself and

all other shareholders (except the defendants) of the plaintiff company, sought a judgment declaring that an agreement made between the plaintiff company and the defendants (now called "Brooks Securities Limited") whereby the finance corporation agreed for the consideration therein expressed to issue all of the shares of its common stock to the defendants as fully paid-up, was not binding upon the finance corporation, and ordering the cancellation of the allotment of so many of the shares as were still standing in the name of the defendants and the surrender of a certificate that had been issued to the defendants for some of those shares.

Rose, J.

 1925.

 TORONTO
 FINANCE
 CORPORATION
 LTD. AND
 COOK
 v.
 BANKING
 SERVICE
 CORPORATION
 LTD.

The action was tried by ROSE, J., without a jury, at a Toronto sittings.

F. W. Wegenast, for the plaintiffs the Toronto Finance Corporation.

G. W. Mason, K.C., for the plaintiff Cook.

W. R. Smyth, K.C., for the defendants.

July 20. ROSE, J.:—The defendants are a company formed and controlled by O. J. Brooks. Their business is to organise other companies and to sell and deal in their shares and other securities, those other companies, or such of them as were most discussed at the trial, being companies for providing funds for builders of houses either by buying ("discounting") second mortgages or otherwise. Before entering upon the organisation of the Toronto Finance Corporation, the defendants, or Mr. Brooks, had organised a somewhat similar company at Windsor, and had opened offices in several cities, in each of which they had a staff of employees, so that they were well equipped for the expeditious handling of any offer of shares for subscription or for any marketing of securities.

Late in 1920, the defendants took into consideration the formation in Toronto of a company such as the Toronto Finance Corporation, and, apparently as a means of satisfying themselves that if such a company was formed they could secure subscriptions for its preferred shares sufficient to provide its working capital, they invited a number of persons to become what they called pre-organisation subscribers. The proposal made to those persons was, shortly, that each should agree to take not less than ten \$10 shares of the preferred stock at a price of \$11 a share payable in instalments, and that to each of them should be issued two fully paid shares of the common stock with each share of the preferred stock for which he agreed to subscribe. This offer was accepted by a large number of the persons to whom it was made, each of

Rose, J.
1925.
TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

them signing an agreement in the form of exhibit 20. Then the defendants consulted a solicitor, Mr. van der Voort, and explained to him some of the objects that they desired to accomplish. They told him, amongst other things, that they desired to have all the common stock of the proposed company issued to them as fully paid, and they discussed with him the consideration that they had to offer and the sufficiency of that consideration.

Pursuant to his instructions, Mr. van der Voort caused application to be made for letters patent under the Ontario Companies Act incorporating a company with a capital of \$2,000,000 divided into 200,000 shares of \$10 each, the petitioners being himself and two of his partners with a student and three stenographers employed in his office. The letters patent were issued, dated the 3rd February, 1921, the purposes and objects of the company, as stated in the letters patent, being such as would be expected in the circumstances, and the seven applicants being named as provisional directors. Power was given to the company to pay a commission for subscribing or procuring subscriptions for its shares, such commission not to exceed 25 per centum of the amount realised.

By the time of the issue of the letters patent the defendants had decided upon the course to be followed in the organisation of the company. They had determined that half of the shares should be issued as preference shares entitled to a cumulative dividend at the rate of 8 per centum per annum in priority to the payment of any dividend to the holders of the common shares and to a certain participation in any dividends declared after dividends of 8 per centum had been paid on both the preference and the common shares, and that the holders of the preference shares should have no right to vote at any meetings unless and until there had been a failure for three half-yearly periods to pay dividends on the preference shares at the rate mentioned. It had been determined also that the company's working capital should be provided by the issue of preference shares for cash, and that the common shares should be issued to the defendants for a consideration which will be mentioned presently.

The defendants, as has been stated, had taken some "pre-organisation subscriptions," that is to say, they had procured agreements from certain persons to subscribe for preference shares if and when the company was formed; and a condition of these agreements had been that each subscriber should be given two common shares with each preference share allotted to him; and they had it in mind that, after the formation of the company, they would have to give some "bonuses" of common shares in order to induce persons to take preference shares at a price which, after commis-

sions on the subscriptions and on the collection of the deferred instalments were paid, would leave the company with adequate working capital. It was thought that as the organisation proceeded and the company's prospects of successful operation improved the bonuses would decrease; and Mr. Brooks, I think, always had it in mind that a time would come when no bonuses would be necessary, and that he would be able to place all of the preference shares without giving away more than about two-thirds of the common shares, so that during the life of the company to be formed the defendant company would be in control of one-third of the voting power of the shareholders of the new company. One of his employees, R. O. Jackson, who, at the time, was manager of the defendant company, was not so sanguine. He thought that every subscriber for preference shares would have to be given some common shares, and his idea was that the defendant company would make sure of its voting power by subscribing for a considerable number of preference shares and keeping for itself as many common shares as would have had to be given, at the time of the subscription, to any new subscriber who had subscribed for the same number of preference shares. He prepared, and exhibited to some of the defendants' canvassers for subscriptions, memoranda shewing what he thought the result of his plan would be. He shewed a progressively diminishing ratio between the "bonus" and the subscription, resulting in giving to the latest subscribers a much smaller bonus than had been secured by those who subscribed early, but nevertheless using up the whole of the common shares. But it seems that Jackson was not fully informed as to Brooks's plan, and, as has been stated, Brooks seems never to have thought of giving all the common shares to the subscribers for preference shares; and it seems to be quite certain that, neither by representation to Mr. van der Voort or to the first directors of the plaintiff company nor by any agreement made with any one at any time, did the defendants, through Brooks or otherwise, make themselves trustees of the common shares or estop themselves from asserting that those shares were issued to them unconditionally and for the consideration mentioned in the agreements which are about to be discussed.

Mr. van der Voort, as has been stated, was told before the plaintiff company was incorporated that the defendants desired to own the common shares. His recollection is that he was not told that some of those shares had been promised to the "pre-organisation subscribers," and it is certain that he was not told that the defendants would bind themselves to give any of them to subscribers, or to hold them for the company when incorporated so that the

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

Rose, J.
1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

company by giving them, or instructing the defendants to give them, to subscribers could in effect issue its preference shares at a discount. He knew, of course, that the defendants contemplated the probability of having to give some of them away, but, so far as he was concerned, that was a matter entirely for the defendants and about which the proposed company would have nothing to say. He was told about a company that the defendants had formed in Windsor with objects similar to those of the proposed company and about the system of operation which had proved successful in that case, and he was asked for his opinion as to whether an agreement to install that system and to take care of the proposed company until it was able to operate successfully would be sufficient consideration for the issue of the common shares as fully paid-up. He said that he doubted whether such an agreement would suffice, but that he thought that an undertaking to subscribe or procure others to subscribe for a considerable part of the preferred stock would be good. Brooks said he would do better than that, he would bind himself to secure the whole of the capital within three years. Accordingly, after further discussions and consideration of the details, proposals were drawn up for submission to the directors after the company had been incorporated.

The letters patent incorporating the company were issued, as has been stated, on the 3rd February, 1921. On the 5th February, the provisional directors called a shareholders' meeting. At this meeting, held on the same day, those who had been provisional directors were elected directors. Then the directors met and passed a number of working by-laws and elected a president and a secretary-treasurer, and the shareholders met and adopted and confirmed the by-laws. The directors then met again and passed by-laws creating the preferred stock (100,000 shares), and providing that subscribers for it might pay the amounts of their subscriptions in instalments. They also settled the form of a prospectus. Then the shareholders met again and confirmed the by-laws just mentioned. Two days later, the prospectus having been filed, the directors met and allotted 10 shares to Mr. van der Voort and received payment for the seven shares subscribed for by the incorporators, and instructed the secretary to apply for a certificate entitling the company to commence business.

The certificate having been obtained, the directors met on the 15th February, 1921, to consider a proposal in writing from the defendants to install their "business system for financing the erection, purchase and sale of homes in well-selected localities;" to attend to every detail in connection with the obtaining by the company of its necessary working capital; to furnish or make avail-

able all their experience and ideas; to open the company's books; to furnish all clerical assistance in the organisation period; to furnish office space until the company should be in a position to take such space for itself; and to turn the company over to the directors as a going and paying institution. The consideration asked for these services was that the balance of the common stock, 99,983 shares) 10 shares had been allotted to Mr. van der Voort, and the original subscribers had 7), should be issued to the defendants. It was stated that, capital being difficult to obtain at the time, it was obvious that the defendants would have to "bonus" the preference shares out of their holdings of common shares; and that the defendants were of the opinion that the company ought to aim at a capital paid up of from \$900,000 to \$950,000, which the defendants were prepared to raise by underwriting it or obtaining subscribers for it. The defendants said that they would have to be allowed to fix the selling price of the preference shares, but that they would fix it at a price to realise to the company not less than \$940,000, the price being never less than 10 per cent. over par; and they suggested that the subscriptions should be made payable in instalments, they to make the collections of the deferred payments and for so doing to be allowed a fee of 5 per cent. of the "sale price." The commission and the collection fee were to be paid or remitted weekly "from the first moneys received upon the obligations to which they pertain." They asked also that they should be appointed the company's "exclusive fiscal agent or broker" to handle the placing of any future issues of debentures or preferred stock.

The directors resolved that the defendants' proposal be accepted, and that the president and the secretary see to the preparation of the requisite documents. The matter was then submitted to a meeting of the shareholders, who approved the action of the directors; and the next day formal agreements, executed by the defendants, were submitted to the directors, who instructed the proper officers to execute them. When they had been executed the directors went on to allot the 99,983 shares.

The agreements as executed follow the lines of the proposal, and it is not necessary to state their terms at any length. In the one the defendants agree to install their system, to give the plaintiff company the benefit of their experience, to furnish office space and clerical assistance for a time, to turn over "the affairs and business" of the plaintiff company to its directors "as an operating and paying business," to enter into a separate agreement obligating themselves for a certain commission to underwrite or sell all of the preference shares at the rate of not less than \$300,000

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

Rose, J.
1925.
TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

yearly (the selling price to be not less than par plus 10 per cent. nor more than par plus 25 per cent. and the net proceeds to the plaintiff company of the issue to be not less than \$940,000); and the plaintiff company agrees for the consideration stated to issue the 99,983 common shares to the defendants as fully paid and non-assessable upon the defendants executing the two agreements. In the other agreement the plaintiff company appoints the defendants to be its fiscal agents and agrees to pay a commission of 15 per cent. on the selling price of the preference shares; the defendants agree to "underwrite or sell" at least \$300,000 of the preference shares yearly until the whole issue is sold or taken up; and there are stipulations as to the fixing of the subscription price, as to the right of the defendants to decide whether the issue is to be "underwritten, sold for cash, or sold 20 per cent. cash and the balance in" instalments, and for the payment of an additional 5 per cent. of the "selling price" for collecting the deferred instalments in case the defendants decide to take subscriptions payable in instalments.

In the fortnight following the execution of the contracts the first directors resigned one by one, the place of each, except that of Mr. van der Voort, who was the last to resign, being filled by the appointment of some one who had become a shareholder. Brooks was one of those appointed, and on the day of his appointment he was elected vice-president. Later he became president and he has continued to hold the office. The vacancy caused by the acceptance of Mr. van der Voort's resignation seems not to have been filled, and it appears that until the annual meeting held in January, 1923, when seven directors were elected, there were never more than six members of the board, although the by-laws called for seven. But nothing turns upon this fact.

The defendants proceeded to carry out their agreement to procure subscriptions for the preference shares and to put the company on its feet. The earlier subscribers for preference shares were given common shares as a bonus, but after a good many subscriptions had been taken it became apparent to the defendants that the cost of procuring subscriptions and of collecting the deferred payments was so considerable that the business would not be profitable to them unless they sold the common shares instead of giving them away. The persons who agreed to take shares were not strictly speaking subscribers; that is to say, they did not apply to Toronto Finance Corporation for the allotment of shares, but their subscriptions, so-called, took the form of agreements with the defendants by which they agreed to buy and the defendants agreed to sell the shares and to deliver certificates when the pur-

chase-price had been paid. In the case of the earlier transactions these agreements witnessed that the "subscriber" agreed to purchase a certain number of shares (always 10 or a multiple of 10) of the preferred stock, "receiving as a bonus therewith" a stated number of shares of the common stock; but after the defendants had decided that they could not afford to give away the common shares the practice was adopted, about August, 1921, of fixing a price for a block of 10 preference and a stated number of common shares, the price named being sufficient to enable the defendants to pay to the plaintiff company the sum that the plaintiff company, under the agreement of February, 1921, was entitled to receive for the 10 preference shares, and to keep something for themselves as the proceeds of the sale of the common shares; and because of this change of policy the defendants adopted a new form of subscription agreement by which the "subscriber" was made to agree to purchase for a stated price a stated number of shares of the preferred stock "accompanied by" a stated number of shares of the common stock. The periodical returns made by the defendants to the plaintiff company shewed clearly that the defendants were proceeding in the way stated, and the plaintiff company's directors were fully aware of the fact—although some of them do not admit that they were.

The defendants succeeded in getting in a good deal of money for the plaintiff company and in putting the business on its feet; and within a reasonable time the plaintiff company opened an office of its own. In 1922 it instructed an auditor, Mr. Metherell, to audit its accounts from the time of its incorporation; and, after a painstaking examination and after discussion with Brooks and the two directors who are the instigators of the present action, Mr. Metherell made a report, dated the 13th June, 1922, in which he set out exactly what was being done and stated that while he understood that the procedure met with the approval of the directors he thought there was need of an "absolute ratification by all parties concerned." Acting upon the auditor's suggestion, the directors on the 22nd June, 1922, passed a resolution the meaning of which is plain enough, although it is somewhat obscured by some unfortunate punctuation and division into paragraphs. The resolution expresses the directors' approval of the course followed as regards the proceeds of the sale of the common stock "in the past or future belonging to the" defendants, and ratifies the "working agreement." In addition to telling what had been done by the defendants, Mr. Metherell's report had shewn—as every statement of the plaintiff company shews—the whole of the common stock to have been issued and fully paid. It had also shewn,

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

Rose, J.
 1925.
 TORONTO
 FINANCE
 CORPORATION
 LTD. AND
 COOK
 v.
 BANKING
 SERVICE
 CORPORATION
 LTD.

as an asset valued at \$999,830, the "rights, privileges, etc., acquired from Banking Service Corporation Ltd.;" and I think it is perfectly clear that in June, 1922, the directors knew that the common shares had been issued to the defendants as fully paid, in consideration of the services which the defendants had agreed to render, and that the defendants were treating those shares as their own to do what they liked with; and I think it is equally clear that the directors then and for a long time afterwards were quite content with the situation, which they believed to be exactly what the defendants say it was. I think they knew and continued to know that whenever the defendants made a sale of shares they put in some common shares with the preference shares and kept for themselves such portion of the purchase-price as they had allocated to the common shares; and I think that not only by the resolution of the 22nd June, 1922, but also by their continuous conduct, including their acceptance of statements furnished by the defendants, their adoption of later reports made by Mr. Metherell, and their preparation of statements for the shareholders, they did everything that they could do to ratify the agreements of January, 1921. There is some contradiction of portions of Mr. Metherell's evidence and some attempt to explain or qualify some of his statements as to conversations with and information given to certain of the directors; but these, in my opinion, are to be disregarded, and implicit belief is due to everything that Mr. Metherell says. Taking his evidence with the documents and with statements made by other witnesses, it is clear, as it seems to me, that there was by the directors a deliberate acceptance of the situation as they found it, and that this acceptance was with full knowledge of what had been agreed and of what had been done, although, perhaps, without knowledge of the law.

It is suggested that not only the directors but also the shareholders of the plaintiff company must be taken to have ratified the issue of the whole of the common stock to the defendants, the suggestion being based largely upon resolutions passed at the statutory meeting held on the 20th May, 1921, and at the annual meetings held in January, 1923, and January, 1924. At the first of these meetings the "transactions and resolutions" of the directors were confirmed, at the second the auditor's report covering the period ending on the 31st December, 1922, was read and adopted and "the acts and resolutions of the directors to date" were approved and ratified, and at the third the auditor's report for the period ending on the 31st December, 1923, was read and adopted and the "acts, contracts, . . . proceedings . . . by the board of directors . . . since the last annual general

meeting, as set forth in the minutes of the board," were approved, ratified, and confirmed. Mr. Metherell's annual statements read at these meetings shewed the issue of the preferred stock as fully paid, and, by shewing the "rights, privileges, etc., acquired from" the defendants as an asset practically balancing the liability represented by the common stock, indicated pretty clearly that the stock was treated as paid-up by the concession by the defendants of these rights and privileges; and it may fairly be said that the shareholders by adopting the reports confirmed the issue; but knowledge of the contracts by which the issue was authorised is not brought home to any considerable number of shareholders, and it can hardly be said that by adopting the reports the shareholders intended to agree that the defendants should be entitled to hold the shares unconditionally. But the ratification in January, 1923, of all preceding acts of the directors is in terms a ratification of the directors' resolution of June, 1922; and, while it is improbable that many of the shareholders knew of that resolution, it seems to me that having seen fit to ratify the directors' actions in this wholesale manner they (or at any rate those of them who were at the meeting) ought to be held to have ratified the directors' recognition of the defendants' right to deal with the common shares as their own. The effect of the ratification is another matter.

In 1921 and 1922 the sale of the preference shares was satisfactory, the amount of stock placed in each year being more than the amount that the defendants had contracted to sell or cause to be subscribed (\$300,000); but early in 1923 the sales began to fall off—because, as is said, some shares had got on the market at a price lower than the price at which the defendants had contracted to sell them—and the result in that year was disappointing, and in 1924 there were no sales or practically none. At the time of the commencement of this action the defendants were making an effort to sell the remainder of the issue in London.

Although the 99,983 common shares were entered in the plaintiff company's books as issued to the defendants, there was no issue of a certificate for that number. The defendants' practice was to certify to the plaintiff company from time to time that such and such purchasers of so many preference shares had paid the contract price, and to request the company to issue to those purchasers certificates for so many preference and so many common shares; and the plaintiff company's practice was to issue the certificates accordingly. Thus it came about that in November, 1922, there were many shares of common stock for which no certificates had been issued. At that time there was some discussion between Brooks and two others of the directors of the plaintiff company, Butler

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

and Sykes, as to further sales of the preferred stock and as to other matters into which it is not necessary to enter, and Brooks made (or caused to be made) a calculation as to the number of common shares that would probably have to be sold with the remaining preference shares when purchasers were found for them, and the conclusion was reached (to state it very shortly, and accepting, in the main, Brooks's evidence on the point) that there was no reason why a certificate for 29,424 common shares should not be issued to the defendants. It was thought that there would be no need to include any of those 29,424 in future sales, and that without them there were as many shares not covered by any certificate as would have to be issued to future purchasers of preference shares and to past purchasers who had not then paid all instalments of their purchase-money and to Butler and Sykes (each of whom was to have 1,000). The certificate was issued accordingly and is held by the defendants; and Butler and Sykes received their certificates; and there stand (or on the 31st March, 1925, there stood) on the books of the plaintiff company in the name of the defendants, but not represented by any certificate, 21,361 common shares—there may be error as to this number, but I think it is the number practically agreed upon at the trial after a great deal of evidence had been given.

The foregoing is by no means a complete summary of all the evidence adduced at the trial. The trial occupied many days and the discussion ranged over a wide field; but what has been stated, together with some facts that will be stated incidentally in the discussion of the law, will be sufficient—perhaps more than sufficient—to dispose of the question upon which, in my opinion, the case must turn. No claim is made for damages for the breach by the defendants of their obligation to place the whole of the preferred stock within three years from the date of the agreements; the defendants do not seem to deny that they are bound to underwrite or procure subscriptions for so much as has not been subscribed, although they do say that, having regard to what has happened, they ought not to be considered as being in default at present; but the question as to whether they are in default and as to the plaintiff company's rights in case a default is established is not raised. Nor is there any question as to the rights of the holders of common shares for which certificates were issued to the purchasers of preference shares; no one asks for a declaration that the certificates are not binding upon the plaintiff company or contends that the plaintiff company is entitled to compel payment by the holders. The claim of the plaintiffs is, in effect, merely a claim for a declaration that the defendants are not entitled to those common

shares that are not represented by certificates issued to other persons, and for incidental relief.

The question of law that has to be decided is whether, upon the facts as established, the issue of the common shares to the defendants as fully paid was an issue at a discount and as such was beyond the powers of the plaintiff company. The defendants contend that value was given, that the transaction was an honest one and beneficial to the plaintiff company, and that the question whether the consideration was as great as the par value of the shares is immaterial. They contend also that even if the transaction originally was not binding upon the plaintiff company it is not open to attack now; that the ratification of it by the directors and shareholders of the plaintiff company is effective; and that, rescission being impossible and the plaintiff company having had the benefit of the defendants' services, the defendants are entitled to hold the shares, although they may be liable in damages if they have not done all that they bound themselves to do.

The fact that the Ontario Companies Act does not contain any express provision to the effect that every share shall be deemed and taken to have been issued subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract filed with the proper officer, was noted by the learned Chief Justice of the Common Pleas in *Re McGill Chair Co., Munro's Case* (1912), 26 O.L.R. 245. Nevertheless, it was decided, applying the law established by *Ooregum Gold Mining Co. of India v. Roper*, [1892] A.C. 125, and other English cases, that, apart altogether from such a provision, the issue of shares at a discount is *ultra vires* a company whose capital is divided into shares of a fixed amount, and the liability of whose shareholders is limited to the amount unpaid on their shares. The rule so stated has been applied in many cases; the difficulty is not in stating it, but in deciding whether the circumstances of any given case are such as to call for its application. If the issue is for cash the case is simple; but when, as here, the consideration is something other than cash a question arises as to whether the Court is to inquire into its adequacy. In many cases such an inquiry is not open, and the defendants here contend that this is one of such cases.

The agreement between the plaintiff company and the defendants was no mere sham. Mr. van der Voort's evidence, which I have no hesitation in accepting in its entirety, makes it abundantly plain that the real agreement was exactly what is set forth in the documents and that there was no attempt such as is referred to in some of the judgments in *Hood v. Caldwell* (1921), 50 O.L.R.

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

Rose, J.
1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

384 and [1923] S.C.R. 488, to put a false face on it. By that agreement the defendants obligated themselves to render services of real value to the plaintiff company, and pursuant to it they have rendered services for which the commission on the sale of the preference shares and the charge for the collection of deferred instalments of the purchase-price are not adequate remuneration. If they had not sold some of the common shares and retained the money received in respect of them they would have been doing business at a loss. In this respect the case is quite different from *Hood v. Caldwell*. But (to adapt the summary made by Ferguson, J.A., of the facts in *Hood v. Caldwell*) the parties to the present action entered into the transaction believing and acting upon the assumption that because the unissued common stock had no actual intrinsic value it might be issued for a consideration less than its nominal par value; neither Brooks nor the directors of the plaintiff company considered that it was necessary to the lawful issue of the stock that the plaintiff company should get \$999,830 in money or what he and they believed and agreed had a value equal to \$999,830; the defendants never intended to give or believed that they were giving \$999,830 or its equivalent for the \$999,830 worth of capital stock issued to them; they did not enter into a contract which bound them to give to the company \$999,830 either in money or in services; the directors of the plaintiff company did not believe that the defendants intended to give or were agreeing to give something worth \$999,983, or that the plaintiff company was supposed to receive anything of a value approaching that amount; according to the documents, which express the true agreement between the parties, the transaction was an exchange of stock, which all knew to be of no present value, for services, which all knew to be worth only a small part of \$999,983; the parties believed that the law permitted such a transaction, and they did not intend to affirm anything different.

The directors of the plaintiff company with whom the defendants contracted were mere nominees of the defendants, having no interest in the company which they represented. In such circumstances, as is pointed out by Mr. Justice Duff in *Hood v. Caldwell*, the transaction has no significance as to the value of the consideration given or agreed to be given for the shares. The price was fixed by the fiat of the defendants, and therefore, to use Mr. Justice Duff's words, ([1923] S.C.R. at p. 490) "the considerations which have led the courts to hold that where there is a real sale entered into between promoters and persons acting independently of them for the company, the price paid in shares is presumptive evidence of the value of the property which, in the absence of fraud

or some kind of unfair dealing, the courts will not go behind, have no sort of application whatever." That being so, the law being that shares must be paid for "either by the meal of cash or by the malt of property, services, or the like"—see Sargant, J., in *Hong Kong and China Gas Co. Ltd. v. Glen*, [1914] 1 Ch. 527, 540—there being nothing to raise a presumption that the malt was in any sense the equivalent of the meal, and the fact being that no one concerned thought or could have thought that the services to be rendered were or could be worth anything like \$999,983, it seems to me that the conclusion that the transaction was beyond the powers of the plaintiff company is inevitable.

The law, I think, is to be found in *Hood v. Caldwell*. In that case, in the Appellate Division, the late Chief Justice of Ontario and MacLaren, J.A., believed that the transaction was a payment for the shares by the transfer of property of an estimated value equal to the nominal value of the shares, and their judgments in favour of the dismissal of the appeal were based, in part at least, upon that finding of fact, so that it was not necessary for them to decide the question upon which this case turns; and Hodgins and Ferguson, J.J.A., being of opinion that there was dishonesty, had not necessarily to deal with the question as to what the result would have been if the transaction had been, as it was in the present case, perfectly honest, but unreal in the sense that no one believed the consideration to be worth the par value of the shares; and Magee, J.A., found a fact which in my opinion cannot be found in this case, viz., that the intention was to provide a means by which the company could issue its preferred stock at a discount, so that one of his reasons for thinking that the transaction was *ultra vires* is not present in this case; and in the Supreme Court of Canada the Chief Justice and Mr. Justice Anglin based their judgments on the fact that the plaintiffs—who, it is to be noted, were not the company—had debarred themselves by laches and acquiescence from claiming the relief sought, and Mr. Justice Duff and Mr. Justice Brodeur, who were in favour of allowing the appeal, thought that fraud was established, while Mr. Justice Mignault adopted the reasons expressed by the Chief Justice of Ontario. The case, therefore, cannot be treated as a decision of the question that has to be decided here. Nevertheless, I think that there is to be found in the opinions of the learned Judges such an exposition of the law as makes it unnecessary for me, as a Judge of first instance, to review the authorities at length; it suffices to say that in none of the cases cited by counsel do I find anything which seems to me to justify a decision that in the circumstances of this case the Court ought to say that it will shut its eyes to the fact that there was

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

Rose, J.
1925.
TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

no sort of relationship between the par value of the shares and the services which the promoters agreed to give in exchange for them—the agreement being made between the promoters and a board of directors who had no real interest in the plaintiff company and who had been put into office, at the behest of the promoters, merely for the purpose of taking such steps as were requisite to organise the company and to validate the agreement and then to retire, and no one pretending that any one thought that the defendants' promise of services was worth \$999,983.

If it had been possible to find that a contract made as this one was, and for a consideration so disproportionate to the par value of the shares, was *intra vires*, it would have been necessary to go on to consider whether the issue of the shares as paid-up, not by services rendered, but by a promise of services, could be supported; but, my opinion on the first point being as stated, it is unnecessary upon the second point to do more than to refer to *Pellatt's Case* (1867), L.R. 2 Ch. 527, and *In re Wragg Ltd.*, [1897] 1 Ch. 796.

If the agreement to issue the shares as paid-up by the defendants' promise of services was *ultra vires* the company in the first instance, the defendants' position, as it seems to me, is not strengthened by the fact that the permanent directors ratified the issue in the manner that has been stated. If the two directors who persuaded the board to bring the action had been the plaintiffs, suing on their own behalf, their action, it may be assumed, would have failed, just as the plaintiffs' action in *Hood v. Caldwell* failed and for the same reason. But this is the company's action, and the effect of proof given by the company that the transaction was beyond its powers in the first instance is not displaced by proof that the present directors did what has been discussed. If the defendants had been able to prove that the permanent directors, having investigated the value of the defendants' promise of services, had come to the conclusion that the promise was worth the par value of the shares, and had, in effect, made a new bargain with the defendants upon the old terms, a different question would have arisen. But there is no room for a suggestion that anything of that sort happened. There is nothing that raises a presumption that the value of the promise appeared to any board of directors to be fairly equivalent to the par value of the shares, and therefore there is no possibility of holding that it was within the powers of the company at the time of the ratification, any more than at the time of the original contract, to agree that the shares should be issued as fully paid-up by the promise of services.

What was done by the shareholders was no more effective than what was done by the directors. Even if all the shareholders had

concurred, their concurrence would not have validated an act that was beyond the powers of the company—and they did not all concur.

For the reasons stated, I am of opinion that the plaintiff company is entitled to a judgment declaring that all its common shares for which no certificates have been issued to persons other than the defendants are unissued, and that the register of shareholders ought to be amended accordingly—this, of course, will not touch any shares that the defendants have bought from persons to whom certificates were issued—and ordering the delivery up of the certificate for 29,424 shares for cancellation, and to their costs of the action, except the costs reserved by my order of the 14th April, 1925; these last mentioned costs ought to be paid by the plaintiffs to the defendants. The effect of such a judgment upon the obligation of the defendants to underwrite or procure others to subscribe for the unissued portion of the preferred stock and upon any other obligations which they assumed by the contracts was neither raised by the pleadings nor discussed at the trial; but, subject to what counsel may say, it occurs to me that the plaintiff company cannot at the same time deny the validity of the issue of the common shares and insist upon the performance of an agreement which was entered into in consideration of an agreement to make that issue, and, therefore, that the defendants ought to be allowed, if so advised, to amend their pleadings and to ask for a declaration that their obligations under the agreements are at an end, and, having made the amendment, ought to have judgment accordingly. Counsel may discuss this matter with me before the judgment is issued if they desire to do so.

I have not been able to understand the theory upon which the plaintiff Cook was brought into the case. He has no great interest, but at a late stage was persuaded by two of the directors to join as a plaintiff. Having joined, what he asks on behalf of himself and the other shareholders upon whose behalf he professes to sue is that the company be given the relief for which it asks. If the company is entitled to relief, as in my opinion it is, it can obtain it without Cook's assistance, and if it is not entitled neither is Cook. Therefore, so far as he is concerned, there will be no order save that he pay to the defendants such costs, if any, as have been occasioned to them by the application made for leave to join him as a plaintiff and by his being a plaintiff.

Rose, J.

1925.

TORONTO
FINANCE
CORPORATION
LTD. AND
COOK
v.
BANKING
SERVICE
CORPORATION
LTD.

[ROSE, J.]

1925.

RE MOORE.

July 22.

Will—Construction—Residue of Estate Given to Wife for her "Use and Benefit"—Direction that she Leave "Balance" if any to Mission Fund—Impossibility of Making Gift over of Part of what had been Given Absolutely.

The testator, dying in 1914, by his will, after a direction for payment of debts and testamentary expenses and two pecuniary legacies, disposed of the residue of his estate in these words: "I give devise and bequeath all the balance of my real and personal property to my wife . . . for her use and benefit and it is my will that my wife at her decease leave the balance of my estate if any for the benefit of" a mission fund. The executor of the testator converted his personal estate into cash, and, after paying one legacy and setting aside a sum to answer the other, deposited the balance in a bank to the credit of the widow in trust. She drew upon that fund from time to time, but when she died intestate in 1925 a considerable sum remained. The testator's land was not sold; the widow lived on it and received the rents and profits until her death:—

Held, that the money and land belonged to the widow and were to be distributed by the administrator of her estate among the persons entitled to share in it.

The testator gave to her all the rights incident to ownership and attempted to make a gift over of the whole or a part of what he gave to her—in so doing he was attempting the impossible.

Re Walker (1925), 56 O.L.R. 517, followed.

MOTION made on behalf of J. J. Moore, executor of the will of William Moore, deceased, and administrator of the estate of Elizabeth Oliver Moore, deceased, the widow of William, for the opinion of the Court as to the effect of the will of William.

July 2. The motion was heard by ROSE, J., in the Weekly Court, Toronto.

F. D. Kerr, K.C., for J. J. Moore, executor of the will of William Moore and administrator of the estate of Elizabeth Oliver Moore.

R. S. Cassels, K.C., for the Home Mission Fund of the Presbyterian Church of Canada.

D. C. Ross, for the Public Trustee.

F. W. Harcourt, K.C., Official Guardian, for infants and for unascertained next of kin of William Moore, deceased.

C. W. Kerr, for Letitia Shearer, a niece of William Moore, deceased.

L. V. O'Connor, for some of the next of kin of Elizabeth Oliver Moore, deceased.

Joseph Wearing, for Janet Elmhurst.

No one appeared for other persons served.

July 22. ROSE, J.:—Many persons who were served, either personally or by letter, with the originating notice have not appeared, but all classes of persons interested were well represented on the argument, and it was declared that those who did not appear (including those, if any, who had not been served) were sufficiently represented by those who appeared by counsel.

Rose, J.

1925.

RE MOORE.

William Moore died in 1914, leaving a will by which, after a direction for payment of debts and testamentary expenses and two pecuniary legacies (the income from one of which was to go to his widow for her life), he disposed of the residue of his estate in the words following:—

“I give devise and bequeath all the balance of my real and personal property to my wife Elizabeth Oliver Moore for her use and benefit and it is my will that my wife at her decease leave the balance of my estate if any for the benefit of the Home Mission Fund of the Presbyterian Church of Canada.”

After the testator's death his executor converted the personal estate into cash and, after paying the one pecuniary legacy and setting aside the other, deposited the balance in a bank to the credit of Elizabeth Oliver Moore in trust. Mrs. Moore drew upon that account from time to time during her lifetime, but when she died in 1925 a considerable sum remained. The testator's land was not sold, and Mrs. Moore lived on it and received the rents and profits until her death. The question asked is whether the land and the money that remains go under William Moore's will to the Home Mission Fund of the Presbyterian Church of Canada or, if not, who are entitled.

If it could be found to be clear on the face of the will that the testator's dominant intention was to benefit the Home Mission Fund, and if, therefore, it could be held that the widow took for herself merely a life-estate with a power to draw upon the capital in case she found that for her support she needed more than the income, and that she was a trustee of the corpus (or of what remained of the corpus) for the Home Mission Fund, it is probable that approximately what the testator intended would be accomplished. But it appears to me that a finding that the dominant intention was to benefit the fund is impossible.

It is true that the intention that what the widow does not part with in her lifetime shall go to the fund is expressed quite strongly; but the gift of the whole residue to the widow “for her use and benefit” is clear, and there is nothing in any part of the will that seems to me to warrant the statement that the testator intended Mrs. Moore to take anything less than an absolute interest. That the testator knew how to create a life-interest appears from the

Rose, J.

1925.

RE MOORE.

words of the legacy to his niece; he gave the money to his executor to hold for the benefit of his wife during her life and he directed that at her death it should be paid to the niece; and a fair inference seems to be that if he had desired to give to his wife anything less than the absolute ownership of the residue he would have followed a similar course. But, apart from any such inference, the gift of the residue is expressed so clearly that it seems to be impossible fairly to put upon the will the construction that one is tempted to try to adopt. The fact appears to be that the testator gave the residue to his wife, intending her to have all the rights incident to ownership, and added a gift over of what remained in specie at her death. In this, as is said by Middleton, J.A., in *Re Walker* (1925), 56 O.L.R. 517, "he was endeavouring to do that which is impossible. His intention is plain but it cannot be given effect to" by the Court, although, of course, there is nothing to prevent effect being given to it by those to whom the ownership will pass.

It is suggested by Mr. Cassels that the use of the word "balance" to describe both what was given to Mrs. Moore and what the testator instructed Mrs. Moore to leave to the Home Mission Fund excludes the idea that Mrs. Moore was to have the right to use or dispose of any part of the corpus of that balance; and that the will therefore ought to be read as giving the "balance" to Mrs. Moore for life and as making her a trustee of the whole of it for the Home Mission Fund after her death. That is a possible, although to my mind a forced, construction: the natural meaning of the whole clause is, I think, that the Home Mission Fund was to have only what Mrs. Moore did not use during her lifetime. But the adoption of the reading suggested by Mr. Cassels would not take the case out of the rule stated in *Re Walker*. Whether the testator meant that the Home Mission Fund should have the whole residue or only so much of such residue as his widow might leave at her death, the fact is that he gave to the widow all the rights incident to ownership and attempted to make a gift over of the whole or a part of what he gave to her, and that in so doing he was attempting the impossible.

In my opinion, the money and land in question belonged to Mrs. Moore and are to be distributed by the administrator among the persons entitled to share in her estate. The questions will be answered accordingly. The costs of all parties will be paid by the administrator out of the fund.

[APPELLATE DIVISION.]

KOHEN V. CULLEY BREAY & DOVER LTD.

1925.

Jan. 27.

Sept. 16.

Sale of Goods—Conditional Sale—Default in Payment—Repossession and Resale—Commission Paid to Agent for Making Resale—Whether Chargeable as Part of Sale-expenses—Interlocutory Costs—Set-off against Amount Recovered in Action—Equitable Right—Determination at Trial—Rules 665, 666.

The defendants sold the plaintiff a motor car and subsequently repossessed and resold it upon the plaintiff's default in making payments as stipulated by the contract of sale. The defendants paid a commission to an agent for making the resale. The agent was not paid a salary and if he had not made the resale the commission would not have been paid:—

Held, that the amount paid should be allowed to the defendants in accounting for the amount received upon the resale.

2. Certain interlocutory costs directed to be paid by the plaintiff to the defendants in any event of the cause were ordered to be set off against the amount for which the plaintiff was awarded judgment at the trial.

The allowance of a set-off of interim costs against a money recovery is a matter of right—an equity to which it is the duty of the Court to give effect.

Thompson v. Parish (1859), 5 C.B.N.S. 685, *Throckmorton v. Crowley* (1866), L.R. 3 Eq. 196, and *Moody v. Canadian Bank of Commerce* (1891), 14 P.R. 258, followed.

This equity may be given effect to either at the trial or upon a substantive application; but, to avoid expense and confusion, it is desirable that the question should be determined by the Judge at the hearing.

This equity is not based on any provision found in the Rules of Court—Rules 665 and 666 are merely ancillary.

ACTION to recover possession of a motor car which the defendants, in January, 1924, sold to the plaintiff upon credit, and of which, as she alleged, they wrongfully took possession in February, 1924, and had since illegally detained; or in the alternative to recover moneys paid by the plaintiff to the defendants upon account of the purchase and moneys paid by her to them for repairs.

January 27. The action was tried by MEREDITH, C.J.C.P., without a jury, at a Toronto sittings.

The plaintiff appeared in person.

W. R. Smyth, K.C., for the defendants.

MEREDITH, C.J.C.P., at the conclusion of the hearing, pronounced judgment in favour of the plaintiff for the recovery of \$125 without costs.

During the trial, in the course of the argument, and at the conclusion of the hearing, the learned Chief Justice said:—

Meredith,
C.J.C.P.
1925.
KOHEN
v.
CULLEY
BREAY &
DOVER LTD.

The defendants sought to charge the plaintiff with three sums of money which they called commissions: one on the sale of her car to her in the first instance; another on the final sale of her car by them after they had taken it from her; and the third on the sale of another car which they had accepted from her, at a fixed price, in part payment of the purchase-price which she was to pay to them for the car in question in the action.

The learned Chief Justice was of opinion that the first and last of these charges were out of the question; and that, if made and the amounts of them retained by the defendants deliberately, it savoured of dishonesty.

As to the second charge, he was of opinion that, the sale having been made by the defendants through one of their servants, they could not charge a commission; that the device of paying their servant by way of commission on the work done by him did not alter his position as their servant, the sale effected by him as their servant being their sale.

As to the set-off of interlocutory costs of the defendants against the sum recovered by the plaintiff, he deemed it inconvenient, and frequently impossible, to go into questions of that character at the trial, to the delay of other trial-court business: such questions should be dealt with generally by the Taxing Officer under the Rules of Court conferring large powers on him; and, if not within his powers, then in Chambers or Court after all the facts were elicited and the amount to which each party was entitled ascertained; though in this case no question of a solicitor's lien arose, such a question did frequently arise, and an opportunity should be given to the solicitor, and to any other person who might be concerned, to be heard, which could not be done in a trial-court, and, if it could, should not, because a trial-court is not the place for hearing and determining such matters.

Both parties appealed from the judgment of MEREDITH, C.J.C.P.

September 15. The appeals were heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

Smyth, K.C., for the defendants.

The plaintiff appeared in person.

September 16. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal and cross-appeal from the judgment of the Chief Justice of the Common Pleas, dated the 27th January,

1925, in the plaintiff's favour for the recovery of \$125 without costs.

The action arises out of a sale by the defendants to the plaintiff of a motor car and the subsequent repossessing and resale of this car by the defendants upon the plaintiff's default in making payment as stipulated by the contract of sale.

The plaintiff's appeal turns entirely upon the date of the repossessing, which, she says, was prior to the occurrence of default. The evidence conclusively establishes that the seizure was not made until after the default occurred.

Upon the defendants' appeal the first question is as to the defendants' right to be allowed a commission paid to an agent for the making of the resale. The learned Chief Justice took the view that this was part of the defendants' overhead expense, and was not occasioned by the plaintiff's default. In this he is plainly in error. The salesman was not paid a salary but merely a commission on sales made; and, if this sale had not been made, this commission would not have been paid. The appeal as to this item will accordingly be allowed and the recovery reduced accordingly.

The second question upon the cross-appeal arises from the refusal of the learned Chief Justice to direct a set-off against the plaintiff's recovery of certain interlocutory costs directed to be paid by the plaintiff to the defendants in any event of the cause. These have been now taxed, it is said, at \$119, and if the set-off is allowed it will entirely wipe out the amount for which the plaintiff recovers judgment.

The right of a litigant to set off a sum, for which he has already recovered judgment, against a sum which his debtor may recover against him, is an equity which it is the duty of the Court to give effect to. This is established by a series of cases, of which *Throckmorton v. Crowley* (1866), L.R. 3 Eq. 196, and *Moody v. Canadian Bank of Commerce* (1891), 14 P.R. 258, will serve as examples. This equity may be given effect to either at the trial or upon a substantive application. To avoid expense and confusion it is desirable that the Judge on the hearing should determine the question without putting the parties to the expense of a substantive application.

This equity is not based on any provision found in the Rules of Court, but the provisions found in the Rules are ancillary merely and deal with certain matters only. Rule 665 confers powers upon a taxing officer to set off costs payable by any party against costs receivable by him. Rule 666 deals with the question of the solicitor's lien and provides that damages or costs shall not be set off to the prejudice of the solicitor's lien for costs in the particular action

App. Div.

1925.

KOHN

v.

CULLEY
BREAY &
DOVER LTD.

Middleton,
J.A.

App. Div. in which set-off is sought, but that interlocutory costs in the same
 1925. action awarded to the adverse party may be set off notwithstanding any lien.

KOHEN
 v.
 CULLEY
 BREAY &
 DOVER LTD.
 Middleton,
 J.A.

The case relied upon by Mr. Smyth, *Thompson v. Parish* (1859), 5 C.B.N.S. 685, is still the law of the land. That makes the allowance of a set-off of interim costs against a money recovery a matter of right. Chief Justice Cockburn stated (p. 693): We are "bound to exercise our equitable jurisdiction in favour of the plaintiffs, and to allow the set-off."

The result is that the plaintiff's appeal is dismissed with costs and the defendants' appeal is allowed with costs to the extent indicated. Owing to the trivial amounts involved in the appeal, these costs may well be fixed at \$50.

Plaintiff's appeal dismissed; defendants' appeal allowed.

[APPELLATE DIVISION.]

1924.
 June 12.
 1925.
 Sept. 25.

M. J. O'BRIEN LTD. v. BRITISH AMERICA NICKEL CORPORATION LTD. AND NATIONAL TRUST CO. LTD.

Company—First Mortgage Bonds—Change in Security by Scheme Carried out by Company—Approval of Scheme—Votes of Bondholders—Protection of Security—Bona Fides—Interests of Class of Bondholders—Minority Rights—Power to Consent to Prior Charge—Delegation of Powers to Committee—Ultra Vires.

Where the majority of the holders of first mortgage bonds of a nickel corporation, under the provisions of a mortgage trust deed securing the bonds, adopted resolutions approving of a scheme modifying, compromising, and altering the rights of the bondholders, in the face of a protest by the minority, it was *held*, that the majority did not exercise their powers under the trust deed for the purpose of protecting or benefiting the security, and therefore they did not exercise the power *bonâ fide* in the interests of the class.

The majority may not exercise their franchise so as to afford the debtor-company and its other creditors less onerous conditions and more generous treatment than it is safe or in the financial interest of the bondholders as a class to grant.

There was nothing in the trust deed which authorised the bondholders to delegate their power to control the action of the trustee or to bind the minority.

By the trust deed the bondholders were given power, by resolution in a prescribed manner, *inter alia*, to accept any other securities of the corporation in lieu of the bonds secured, or to consent to an issue of securities of the corporation constituting a charge prior to the trust deed and the bonds thereby secured:—

Held, that the power to consent to a prior charge, once exercised, was exhausted.

The scheme was not legally approved and was not within the powers given by the instrument. 1924-25.

North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589, *M.J. O'Brien v. Ex p. Cowen* (1867), L.R. 2 Ch. 563, and *Allen v. Gold Reefs of West Africa Ltd.*, [1900] 1 Ch. 656, and other cases, referred to.

v.
**BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.**

THE plaintiff company, the holder of or beneficially entitled to first mortgage bonds to the amount of \$625,000, part of a \$6,000,000 issue by the defendant the British America Nickel Corporation Limited, payable on the 1st February, 1931, bearing interest at 6 per cent. per annum payable half-yearly, and secured by a mortgage deed in trust to the defendant the National Trust Company Limited, bearing date the 15th March, 1916, upon property and assets of the nickel corporation, brought this action for a declaration that a certain plan or scheme carried out by the defendant nickel corporation, by which the plaintiff company's security and rights for the payment of the bonds had been changed, was not binding upon the plaintiff company and should not have been carried into effect; and to recover from the defendant the National Trust Company Limited \$625,000 and interest thereon at 6 per cent. per annum from the 1st August, 1920, and interest on arrears of interest.

The action was tried by KELLY, J., without a jury, at a Toronto sittings.

W. N. Tilley, K.C., and *Strachan Johnston*, K.C., for the plaintiff company.

Glyn Osler, K.C., and *G. R. Munnoch*, for the defendant the British America Nickel Corporation Limited.

I. F. Hellmuth, K.C., and *W. K. Fraser*, for the defendant the National Trust Company Limited.

June 12, 1924. KELLY, J.:—The history of the transactions involved in this claim is lengthy, and the evidence taken at the trial is so voluminous as to make it impossible within reasonable limits of space to set out here all its details. I shall, however, refer specially to some of its most essential features.

Prior to the issue of the first mortgage bonds the defendant nickel corporation acquired from Messrs. J. R. Booth and M. J. O'Brien the nickel mine property which formed part of the assets on which the bond-mortgage of the 15th March, 1916, secured the said bonds; Mr. Booth received \$2,375,000 of the said bonds and Mr. O'Brien \$625,000, representing payment or part payment for the mine. The remaining \$3,000,000 of the issue was afterwards acquired and held for or on behalf of the British Government. It

Kelly, J.
1924.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST Co.
LTD.

is needless for present purposes to enter upon the reasons why the Government became interested in and acquired these bonds, beyond stating that the original purpose was to secure a loan—said to be \$3,000,000—to the nickel corporation. A very large amount of the capital stock of the nickel corporation was also acquired by the British Government or its representatives. The indenture of the 15th March, 1916, securing these bonds, is an elaborate one and bears evidence of having been prepared with great care. The provision in it which is of most importance here is clause No. 26. Because reference will be made to its terms as we proceed, I quote it in full:—

“Twenty-sixth. Bondholders may act for all purposes hereunder by resolution at a meeting passed by a vote of the required majority, or by instrument signed by or on behalf of the required majority, and such resolution or instrument so passed or signed shall bind the minority to the same extent as if such minority had concurred therein or signed the same, and bondholders shall, in addition to all other powers, have the following powers, exercisable only by ‘extraordinary resolution,’ that is a resolution passed at a meeting of bondholders duly convened and held, at which a clear majority in value of the whole of the bondholders is present in person or by proxy, and carried by a majority consisting of not less than three-fourths of the persons voting thereat, upon a show of hands, and, if a poll is demanded, then by a majority consisting of not less than three-fourths in value of the votes given on such poll, viz.:—

“(a) Power to sanction any scheme for the reconstruction of the corporation or for the amalgamation of the corporation with any other company or for the selling or leasing of the undertakings or part thereof of the corporation to any other company, where the consent of the bondholders to such reconstruction or amalgamation or leasing may be required;

“(b) Power to authorise the trustee to sell or transfer and to accept in satisfaction or part satisfaction for the sale or transfer of, or in lieu of, all or any part of the mortgaged premises, any shares, whether preference, ordinary, or otherwise, debentures, bonds, debenture stock, or any other securities of any company formed or to be formed;

“(c) Power to sanction any modification or compromise of the rights of the bondholders against the corporation or against its property, whether such rights shall arise under this indenture or otherwise;

“(d) Power to accept any other securities of the corporation in lieu of the bonds hereby secured, or to consent to an issue of

securities of the corporation constituting a prior charge to these presents and to the bonds hereby secured;

“(e) Power to assent to any change in addition to or omission from the provisions contained in this indenture which shall be proposed by the corporation, and to authorise the trustee to concur in and execute any deed supplemental to this indenture embodying the same.”

The defendant the nickel corporation, having acquired the property referred to, made large expenditures in development and the erection of a smelter and refinery. It is said that this expenditure ran into millions of dollars. Contracts were made for the supply of nickel by the company to the British Government; and a large amount of the corporation's capital stock was also held in Norway, where a corporation called Kristianssands Nikkelraffineringsasverk (hereinafter for convenience referred to as K.N.R.) operated in nickel and also had a contract for the supply of nickel to the British Government.

Of the said \$6,000,000 of first mortgage bonds, \$3,000,000 were designated “series A bonds” and \$3,000,000 were designated “series B bonds;” and as between the bonds of each series there was no preference, priority, or distinction, except that certain sums were made payable earlier than the above-mentioned date of maturity for the redemption of bonds of series A.

The nickel corporation made default in payment of the half-year's interest which came due to the plaintiff on the 1st February, 1921, on the \$625,000 of bonds held by it; and default still continues. K.N.R. became a creditor of the nickel corporation in a sum exceeding \$2,300,000. The nickel corporation was also at that time indebted to the Canadian Bank of Commerce in about the sum of \$2,000,000, the bank holding as security certain guarantees from Sir James Dunn, V. Hybinette, and the said K.N.R., and perhaps other security, but not in priority to the security held by the plaintiff for its holding of the said first mortgage bonds. Sir James Dunn and Hybinette were directors of the nickel corporation, and Hybinette was also a director of K.N.R. Other directors of K.N.R. were also directors of the nickel corporation. It is of importance to keep in mind the sort of alliance which this close relationship and its possible consequences indicate.

In 1920 it seemed to those immediately in charge of the nickel corporation's administration, or to some of those intimately concerned in or affected by its operations, that its financial condition was such that some scheme of refinancing was necessary or desirable. While large sums, as I have already mentioned, had been expended in connection with development of the mine and for

Kelly, J.

1924.

M.J.O'BRIEN
LTD.

v.

BRITISH
AMERICA
NICKEL

CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

Kelly, J.
1924.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

plant and equipment, the nickel corporation owed large sums (outside of secured indebtedness) which it had not then sufficient moneys to pay. At that time Mr. Booth continued to be the holder of his \$2,375,000 of bonds; and the plaintiff had acquired the \$625,000 which had belonged to Mr. M. J. O'Brien. Years prior to that time, the nickel corporation had issued a very large amount of debenture stock as a floating charge upon some of its assets; to this debenture stock the said \$6,000,000 first mortgage bonds were made and continued to be a prior charge. Negotiations for the proposed refinancing continued during the latter months of 1920, in which a most active part was taken by representatives of K.N.R. and other Norwegian interests. The scheme proposed for such refinancing included very radical changes in the status of the holders of said first mortgage bonds, in that it involved the loss to them of the priority of security to which they were entitled under the trust mortgage of the 13th March, 1916, and the documents supplementary to it, as well as postponing the date of maturity of these bonds, and in other respects rendering their security much less valuable than under that trust mortgage. To carry out the proposed scheme it was necessary to obtain the consent, as required by the trust mortgage, of the necessary majority of these bondholders. To make up this necessary majority, Mr. Booth's assent was requisite; the plaintiff's holding of bonds being much less in amount, its assent was not necessary.

The nickel corporation issued an elaborate "Scheme for Reconstruction," dated the 26th January, 1921, which proposed that for the purposes of the scheme a committee of four persons should be constituted with powers to do many things which the said trust mortgage had provided should be done by these bondholders. On the 28th January, 1921, at a meeting of holders of the said first mortgage bonds, a resolution was passed consenting and agreeing to the creation and issue by the nickel corporation of \$500,000 6 per cent. prior lien bonds, ranking in priority to the said first mortgage bonds, which said prior lien bonds should mature in 10 years from the 9th December, 1920 (redeemable at an earlier date at the option of the corporation), and be secured "by trust deed constituting a first charge upon the undertaking, property, and effects of the corporation, which shall be a specific charge as to the lands and plant of the corporation and a floating charge as to the remainder of the assets of the corporation, and which charge the corporation has represented it is entitled to give and create subject to the consent of the holders of the said 6 per cent. first mortgage 15-year gold bonds being obtained;" and sanctioning what was said to be a modification and compromise of the rights

of holders of the said first mortgage bonds against the corporation; and by indenture bearing the same date (the 28th January, 1921) the nickel corporation and the National Trust Company Limited purported to agree and declare that "the charges, mortgages, and hypothecs created by the said bond mortgage of the 15th March, 1916, and instruments supplemental thereto, should be postponed to and rank after the charges, mortgages, and hypothecs created by the prior lien indenture of the 9th December, 1920, which was made to one Percy C. Stephenson, securing the said \$500,000 issue of 6 per cent. prior lien bonds, in the same manner and to the same effect as if the said document of the 9th December, 1920, had been dated and registered prior to the said trust mortgage of the 15th March, 1916, and the instruments supplemental thereto." These prior lien bonds were accordingly issued and delivered.

The proceedings for carrying out the larger plan of refinancing continued along the lines of the above-mentioned "scheme for reconstruction," which, with slight modifications, was sanctioned and approved at a meeting of the holders of the said first mortgage bonds, the plaintiff, through its representative, protesting and objecting and voting against the scheme and its adoption. From the very beginning the plaintiff opposed and protested against the proposed scheme, on the ground that it was improper and unfair and not a due and proper exercise of, but was in violation of, the powers conferred by the trust mortgage of the 15th March, 1916, and its supplementary agreements, and an invasion of its rights under that trust mortgage. The scheme for reconstruction provided for the creation of an issue of income bonds of the nickel corporation as follows: first income bonds, \$6,000,000; "A" income bonds, \$6,000,000; "B" income bonds, \$12,500,000.

One of the terms was to give to the said first income bonds priority over the said \$6,000,000 of first mortgage bonds and postpone the date of their maturity from the year 1931 to the year 1950; and until that postponed date the holders of the said first mortgage bonds were to be entitled to a charge upon the net income of the nickel corporation, should it have any income after the payment of its expenses; so that, instead of the \$6,000,000 first mortgage bonds being (as they originally were) a first charge, payable in 1931, upon the property and assets charged and mortgaged by the trust mortgage of the 15th March, 1916 (the value of which mortgaged property and assets admittedly then far exceeded the amount of the said bonds), new bonds to a very large amount were given preference over them, the time of their maturity was postponed, and in the meantime their right to receive payment thereon was

Kelly, J.
1924.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

Kelly, J.
1924.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

made to depend upon what, if any, net income the nickel corporation should earn. In several other respects these first mortgage bonds were degraded from the secured position they held as originally issued—as, for instance, by the provision that on a winding-up of the corporation a very large amount of this extraordinarily large issue of new bonds should rank therewith; \$2,000,000 of the said first income bonds was to go to the Canadian Bank of Commerce in payment of its existing claim (to which the said first mortgage bonds enjoyed priority), provided the time for payment of that claim should be extended for three years and its existing security or part of it surrendered; while a similar amount of the first income bonds (\$2,000,000) was to go to a Norwegian bank or such bank or organisation as might be induced to lend money to the nickel corporation. In several other respects, which I do not here attempt to enumerate, the status of the first mortgage bonds was materially changed for the worse. Only by a study of the terms of the scheme for reconstruction and comparison of the safe security which the said first mortgage bondholders enjoyed with the position in which the scheme placed them can these material changes be fully appreciated. In addition to this, the new scheme contained terms and conditions for special privileges to the British Government which were not accorded to the plaintiff. The scheme also contemplated the discharge by the National Trust Company Limited (the mortgagee) of the trust mortgage of the 15th March, 1916.

The plaintiff company, having failed to have effect given to its protests and objections, instituted this action on the 31st March, 1921 (the date of the meeting of the first mortgage bondholders at which the resolutions now objected to were passed), and on that date an injunction order was issued restraining the defendants, until the disposal of a motion to continue the injunction or until the trial, from giving effect to the said scheme of reconstruction or acting on the resolutions of the meeting.

On the motion to continue, Mr. Justice Middleton, on the 15th April, 1921, refused to continue the interim injunction, on the ground that great damage might result if the scheme were not allowed to go through, thus leaving the plaintiff to its other remedies if it should succeed in establishing its position. In his reasons (20 O.W.N. 184) he said that there was no need of an injunction for the plaintiff's protection; that, if the plaintiff had rights, the defendants would act in disregard thereof at their peril; and, if the mortgagee should wrongfully discharge the first bond mortgage, it would be answerable to the plaintiff for damages.

On an application to the Court by the National Trust Company

Limited for advice as to what action, if any, should be taken and what course should be adopted by it as such trustee, in view of the resolutions passed at the meeting of the 31st March, 1921, and an adjournment thereof and of resolutions passed by the holders of the said debenture stock of the nickel corporation, an order was made on the 30th April, 1921, that the said trust company be authorised to do what was necessary and desirable to carry out and give effect to the said resolutions, and that, notwithstanding that such resolutions should be carried out, the action should proceed to trial and the plaintiff's rights should be determined as if the resolutions were still to be carried into effect; and, should the Court declare that the resolutions ought not, as against the plaintiff, to have been carried into effect, or be of opinion that for any reason the defendant should be restrained from giving effect thereto, the said trust company should, forthwith upon surrender by the plaintiff of its bonds (with all coupons attached subsequent to those which matured on the 1st August, 1920), pay to the plaintiff as damages the face value of its bonds (\$625,000) with interest thereon from the 1st August, 1920; and, further, that the trust company, before carrying the said resolutions into effect, should take security by way of indemnification against any liability which it might incur to the plaintiff. The order made other provisions not necessary to be here enumerated.

On appeal from the order of Mr. Justice Middleton of the 15th April, 1921, an order was made by the Appellate Division that the action should proceed to trial on the terms and conditions of the said order of the 30th April, 1921.

At the trial many reasons were advanced why the new scheme of refinancing could not be supported in law, but should, as against the plaintiff, be set aside, the chief being, in general terms, that it goes far beyond what was contemplated or authorised by the trust mortgage of the 15th March, 1916, and the agreements supplementary to it; that, while that document provides for *modification* and *compromise* of the rights of the first mortgage bondholders against the nickel corporation and its property, it does not authorise a discharge of the security, as has now been done, and a substitution of something which is not a security in the sense intended by the trust mortgage; that, while the powers conferred by clause 26 of that document are exercisable by the bondholders in the manner and subject to the terms therein contained, it does not authorise or contemplate the handing over of the exercise of these powers, as has also now been done, to a committee, especially to a committee to be appointed as the scheme of reconstruction provided that the committee of four in this instance should be ap-

Kelly, J.

1924.

M.J.O'BRIEN
LTD.

v.

BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST Co.
LTD.

Kelly, J.
1924.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

pointed; and that, in any event, the whole transaction is vitiated by the conferring of benefits on some of the bondholders who constitute a part of the necessary majority which voted in favour of the adoption of the scheme, as an inducement so to vote.

Just here it is advisable to state some other essential facts as I find them. In and prior to 1920, K.N.R. was interested in the defendant nickel corporation and its stock and securities. Dr. Vogt was the president of K.N.R. He and Dr. Eyde, representing K.N.R., came to Canada in 1920 in connection with the proposed refinancing. Hybinette was a director of K.N.R. and was also a director and vice-president of the nickel corporation. Communications had been entered upon with Mr. Booth relative to his agreeing, as a holder of this large block of first mortgage bonds, to the proposed scheme of refinancing. The communications which passed between the promoters of the scheme and their representatives on the one side and Mr. Booth and his representatives on the other make it evident that he was not at first favourable to the scheme, and throw light on the manner by which he was, later on, won over to its support. There was an interlocking of interests between directors and others in charge of the administration of K.N.R. and directors and officials of the nickel corporation. At a time when prices of nickel were high the British Government had obligated itself by contract extending over a term of years to purchase annually from the nickel corporation a very large quantity of nickel at prices much in excess of those which prevailed at the time of the negotiations for the said refinancing. Owing to the very substantial decline in the price of nickel in these later years this contract became an onerous one on the Government. The falling off in the demand for nickel due to the ending of the war may have contributed to this burden.

The committee of four appointed in pursuance of the scheme for reconstruction consisted at first of Mr. Black, secretary of J. R. Booth Limited, said to have been appointed by the holders of the 6 per cent. first mortgage bonds of the nickel corporation, Dr. Per Rygh, appointed by the holders of the 6 per cent. debenture stock of the nickel corporation, Mr. Arscott, appointed by the joint action in writing of his Excellency Dr. S. Eyde and the Canadian Bank of Commerce, and Mr. Frater Taylor, appointed by his Majesty's Government; and on its face the scheme declares that "it was negotiated with the various parties interested, by his Excellency Dr. S. Eyde of Christiana, Norway, acting at the request of the Norwegian Government in the interests of the Norwegian debenture stockholders." It will, therefore, be seen that the control and powers which the trust mortgage of the 15th March, 1916, vested

in the holders of these first mortgage bonds were by the new scheme turned over to a committee, not of these bondholders, but of persons, the interests of some of whom or of the persons or bodies they represented were in conflict with those of the holders of these first mortgage bonds. For instance, debenture stockholders and the Canadian Bank of Commerce, over both of whom the first mortgage bondholders had a preferential security, were given representation on the committee.

The powers conferred by the scheme upon the committee included power to pass upon and settle on behalf of the first mortgage bondholders and debenture stockholders all trust deeds, supplemental trust deeds, mortgages, releases, contracts, covenants, documents, and things required for the purpose of giving effect to and carrying out the terms of this scheme and arranging for the exchange of securities; and decisions of the committee on questions arising out of such authority, it was declared, should be binding on both the corporation and the first mortgage bondholders and on the stockholders. Not only was there this complete change of control, but the scheme provided for its modification in such manner as the committee might unanimously approve should any such modification appear to them to be desirable in the interests of the holders of the said first mortgage bonds and of the said debenture stock of the corporation.

But, as I have already mentioned, the consent to and approval of the scheme by Mr. Booth as a holder of first mortgage bonds was necessary to carry the proposal. Earlier communications led up to two very significant and important letters to Mr. Booth, dated the 6th January, 1921, one from Hybinette, the other from the defendant nickel corporation, signed by Hybinette as its vice-president. The former of these is as follows: "Conditional only upon the completion of the exchange of your present bonds for 'A' income bonds under the proposed re-organisation, I undertake to deliver to you common stock of British America Nickel Corporation Limited of the par value of \$2,000,000." The other sets out at length the main features of the scheme for reconstruction and undertakes to have \$8,000,000 of the Norwegian-owned common stock of the defendant nickel corporation pooled with Mr. Booth's (about \$2,500,000) in a voting trust of three trustees. Mr. Booth evidently regarded these two letters as inseparable, for on the 7th January, 1921, he wrote to Hybinette, as vice-president of the nickel corporation, acknowledging receipt of the two letters, "one signed by you in your official capacity as vice-president of the British America Nickel Corporation Limited and the other by you personally, and in consideration of and upon the performance of

Kelly, J.

1924.

M. J. O'BRIEN

LTD.

v.

BRITISH

AMERICA

NICKEL

CORPORATION

LTD. AND

NATIONAL

TRUST CO.

LTD.

Kelly, J.
1924.
M. J. O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

the agreement, as to the delivery of \$2,000,000 of common stock of British America Nickel Corporation Limited contained in your personal letter, I consent to the plan of reconstruction as defined in the letter signed by you as vice-president of the British America Nickel Corporation Limited, and also upon the further condition that the British America Nickel Corporation Limited arrange to my satisfaction with his Majesty's Government for the unpaid gold bond interest so that it will not be a current liability or a charge upon the assets of the British America Nickel Corporation Limited in priority to the 'A' income bonds. This consent is subject to consents being obtained from all parties whose consent is or may be necessary, and to the proceedings for re-organisation and all documents relating thereto being submitted to and approved by my counsel."

It is manifest that Mr. Booth was not consenting to the proposed re-organisation unless on condition that the other proposal, namely, that there be delivered to him common stock of the nickel corporation of the par value of \$2,000,000, be carried out. That attitude is maintained in the communications which were later exchanged between his solicitor and the solicitors for the nickel corporation, who were also the solicitors for the Canadian Bank of Commerce; and Mr. Booth himself expresses it in a letter to the nickel corporation's solicitors that, subject to the performance of the undertakings contained in the two letters to him of the 6th January, he was willing that they should proceed with the matter, and he agreed that all the first mortgage bonds of the nickel corporation then held by him should be voted in favour of carrying the proposed scheme into effect.

Then, on the 7th February, 1921, Captain Vogt and Hybinette wrote on the bottom of Hybinette's letter to Mr. Booth of the 6th January, as follows: "In consideration of your consent to approve of the scheme for reconstruction of the British America Nickel Corporation Limited on behalf of Kristianssands Nikkelraffineringsverk, we, the undersigned directors, thereunto duly authorised, do hereby confirm and agree to carry out the above letter of undertaking by Mr. V. Hybinette as to the delivery of common stock of the British America Nickel Corporation Limited of the par value of \$2,000,000."

The nickel corporation's need of money at that time was urgent. It is suggested in the material that a receivership was imminent if money were not procured. It was about to close down operations, and as a matter of fact it did very soon afterwards close down, and it remained closed for more than two years. But were these con-

ditions or any of them a justification for sacrificing, in the manner in which that was accomplished, the secured position held by the first mortgage bondholders, with their large margin of security prior to all other debts, charges, and claims? It would subject one's credulity to a strain to accept the suggestion that holders of these first mortgage bonds, whose security was undoubted, consented to forfeit their strong position unless in receipt of some corresponding advantage, especially at a time when the nickel corporation's condition was causing some anxiety.

The record of these negotiations must be read to be fully understood, but there can be no question that Mr. Booth's approval of and consent to the scheme was procured in advance of the meeting of the first mortgage bondholders, and that the delivery of the \$2,000,000 of common stock entered into the transaction as the inducement to obtain his approval and consent. I find, too, that the parties or bodies interested in the scheme, and who, it provided, should participate in its benefits, were aware of the means and terms by which he was induced to give his consent and vote.

The nickel corporation has also pleaded that on a previous occasion a number of shares of its capital stock were transferred to M. J. O'Brien which he insisted on receiving as a consideration for agreeing to the creation of the \$6,000,000 first mortgage bonds; that Mr. Booth had not then received equal treatment with Mr. O'Brien; that the transfer to him of \$2,000,000 of common stock at the time this new scheme was going through was for that reason; and that such transfer was unconnected with and was not a part of the said scheme. The evidence does not support the contention either that Mr. Booth, on the prior occasion, did not receive equal treatment with Mr. O'Brien or that he did not fully understand and agree to what was then done. Indeed, the reasonable deduction from the evidence is that he was fully aware of it, discussed it, and had communications about it with either Mr. O'Brien or his son. There was no intimation now apparent that Mr. Booth was dissatisfied with Mr. O'Brien's then receiving stock, or that he either desired himself to receive stock or was prevented from receiving it. To my mind, the present attitude was assumed by the nickel corporation to provide an excuse or justification for the giving to Mr. Booth of \$2,000,000 of stock for the purpose of procuring his vote, not otherwise obtainable, to the scheme, which without that vote would have failed. The Norwegian interests, with whom the nickel corporation was closely allied, had stock which, with the knowledge of the nickel corporation, and no doubt with its approval and active co-operation, was drawn upon to contribute to the \$2,000,000; and

Kelly, J.
1924.
M.J.O'BRIEN
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

Kelly, J.
1924.

M.J.O'BRIEN
LTD.

v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

part of the amount was made up from stock held by or for the British Government, which by the scheme of re-organisation was relieved from its onerous contract to purchase nickel from the defendant nickel corporation.

Giving full effect to the obligation which, in law, a minority is under, to submit to the decision of the majority, acting *bonâ fide* and fairly in the interests of the class as a whole, there is still here the very strongest sort of evidence that what the majority did was not in the *bonâ fide* exercise of the rights which a majority may exercise, and that it was unfair to and oppressive upon the plaintiff. The majority, in consideration of personal benefit, bargained in advance of the meeting as to what they should do at the meeting, and their consent to the scheme was thus secured. How can it be said that a decision arrived at in that manner was the result of a *bonâ fide*, fair, and uninfluenced consideration of the interests of the first mortgage bondholders as a class? Was it not rather on a consideration of what would benefit the nickel corporation and the personal interests of those whose votes were thus secured? The decision was not reached upon a deliberate consideration at a meeting where with open minds those present discussed the scheme on its merits as it affected the whole body of bondholders. Had the majority at the meeting, after free and uninfluenced deliberation, exercised their discretion fairly and as it seemed to them best, the Court would not sit in review upon their decision. This, however, is far removed from what actually occurred. To uphold the scheme, the vote in favour of which was thus influenced by special negotiations in advance of the meeting, would mean sanctioning unfair and unjustifiable treatment of a dissenting minority.

As against the plaintiff, the scheme is beset by objections fatal to its validity. With the other holders of the bonds, who may be assumed to have been satisfied with the benefits they received for supporting the scheme, I am not at present concerned. The argument that the nickel corporation could not have procured the money it needed on better or different terms is no answer to the plaintiff's objections. The first mortgage bondholders were firmly secured; and the position is untenable that a mortgagee can be deprived of or rendered less safe in his security merely because the mortgagor is in need of money.

Referring to the provisions of clause 26 of the trust mortgage of the 15th March, 1916, the scheme which was put through was not a reconstruction of the corporation but an attempted re-organisation of its finances; it was not an amalgamation of the corpora-

tion with any other company, nor a selling or leasing of the undertaking or any part of it; it was not a modification of the rights of bondholders such as that section contemplated; but it assumed to turn over to and confer upon a committee, not necessarily representing the interests of the first mortgage bondholders, powers which belonged to these bondholders, and to authorise the substitution for their security of something which is not a security. The new scheme contained a device by which shares of stock could eventually be substituted for these first mortgage bonds. Shares are not a security, and therefore it is possible, under the scheme adopted and now in force, for the plaintiff to be deprived of the kind of security to which it was and is entitled under the bond mortgage, and be given in substitution something which is not a security. That in itself, in my opinion, is, as against the plaintiff, fatal to the validity of this new scheme.

In the case of *Mercantile Investment and General Trust Co. v. International Co. of Mexico* (1891), 7 Times L.R. 616, in which the question came up of the exchanges of debentures of a company for paid-up preference shares in another company which had taken over the assets and liabilities of the company which issued the debentures, Lord Justice Lindley had this to say: "In order to decide the questions thus raised, it is necessary to ascertain (1) the terms on which the debentures were issued; (2) the position of affairs when the resolution was passed; and (3) the mode in which the meeting which passed it was convened. . . . Powers given to majorities to bind minorities are always liable to abuse, and while full effect ought to be given to them in cases clearly falling within them, ambiguities of language ought not to be taken advantage of to stretch them and make them applicable to cases not included in those which they were apparently intended to meet. To take the language of the clause, the power to release the mortgaged premises does not include a power to release the defendant company; the power to modify the rights of the debenture-holders against the company does not include a power to extinguish all their rights; the power to compromise their rights pre-supposes some dispute about them, or difficulty in enforcing them, and does not include a power to exchange their debentures for shares in another company where there is no such dispute or difficulty. It is a mistake to suppose that a power to compromise a claim for money includes a power to accept less than 20s. in the pound if the debt is undisputed and the debtor can pay; a power to compromise does not include a power to make presents."

The scheme, therefore, cannot be regarded as a compromise;

Kelly, J.

1924.

M.J.O'BRIEN
LTD.

v.

BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

Kelly, J.

1924.

M.J.O'BRIEN
LTD.v.
BRITISH
AMERICA
NICKELCORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.

neither compromise nor modification to which clause 26 refers means destruction of security, either wholly or in part, to which a dissenting first mortgage bondholder is bound to submit.

Having in mind the whole procedure leading up to the resolutions and the final adoption of the scheme, there can, in my opinion, be but one conclusion, namely, that against the plaintiff the transaction cannot stand.

I have not thought it necessary to discuss the further argument advanced by Mr. Tilley, that in issuing the \$500,000 of prior lien bonds above referred to, the power in the bondholders by the requisite majority "to consent to an issue of securities of the corporation constituting a prior charge to these presents and to the bonds hereby secured" was exhausted, and therefore that there was no power to consent to or adopt the latter scheme which is now attacked. The power is to consent to "an issue" of securities, not "issues" or "successive issues" or "issues from time to time" or to such effect. In a document of such importance one would assume that its language was carefully chosen; and there is force in the argument that, if it was intended to permit successive issues of securities constituting such prior charge, language more appropriate to that end than that which was used would have been employed. It is, however, unnecessary to decide the point.

The plaintiff is entitled to judgment as asked.

The defendant the British America Nickel Corporation Limited appealed from the judgment of KELLY, J.

April 8, 9, 20, and 21, 1925. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

Glyn Osler, K.C., and *G. R. Munnoch*, for the appellant corporation, argued that the case must be decided having regard to the situation that existed when the scheme in question was approved by the bondholders. Anything done subsequently would not affect its validity, and so could not be relevant to the action. The scheme was within the provisions of the mortgage deed of trust, and its provisions gave the corporation its only chance to continue as a going concern, having regard to the financial difficulties which it had encountered: *Re Dominion of Canada Freehold Estate and Timber Co. Ltd.* (1886), 55 L.T.R. 347; *Goodfellow v. Nelson Line (Liverpool) Ltd.*, [1912] 2 Ch. 324; *In re Labuan and Borneo Ltd.* (1901), 18 Times L.R. 216; *Shaw v. Royce Ltd.*, [1911] 1 Ch. 138. The scheme was propounded *bonâ fide* and in the best interests of the corporation and all concerned: *In re Alabama New Orleans Texas and Pacific Junction Railway Co.*, [1891] 1 Ch.

213; *In re Tea Corporation Ltd.*, [1904] 1 Ch. 12; *Follit v. Eddystone Granite Quarries*, [1892] 3 Ch. 75; *Sneath v. Valley Gold Ltd.*, [1893] 1 Ch. 477; *In re Joseph Stocks & Co. Ltd.*, [1912] 2 Ch. 134, note; *Northern Assurance Co. Ltd. v. Farnham United Breweries Ltd.*, [1912] 2 Ch. 125; *North-West Transportation Co. v. Beatty* (1887), 12 App. Cas. 589; *Burland v. Earle*, [1902] A. C. 83; *Walker v. Elmore's German and Austro-Hungarian Metal Co. Ltd.* (1901), 85 L.T.R. 767; *Cook v. Deeks*, [1916] 1 A.C. 554; *Castello v. London General Omnibus Co. Ltd.* (1912), 107 L.T.R. 575; *Palmer's Company Law*, 12th ed., p. 160. It was in the interests of the corporation to cancel the agreement in which the British Government was interested, and its cancellation did not affect the decision of the British Government to vote the bonds held on its behalf in favour of the scheme. The corporation was not a party to the share transaction between Booth and Hybinette, which transaction took place by reason of Booth's insistence that he be placed on an equal footing with O'Brien as to shares held, as he considered that O'Brien had obtained an advantage in a previous transaction. In any event, if Booth's vote was withdrawn, there was a sufficient majority to pass the necessary resolution in favour of the scheme. The powers of the trust deed were not exhausted by a prior exercise thereof; the provisions of the scheme providing for a committee were necessary and valid; and, if the committee did in fact do anything inconsistent with the provisions of the scheme, such considerations were irrelevant to the present action.

W. N. Tilley, K.C., and *C. F. H. Carson*, for the plaintiff company, respondent, contended that the scheme had not been carried through in the manner provided by the bond mortgage, inasmuch as there was no right to delegate to a sub-committee power to modify the scheme; that the scheme was bad for lack of good faith and fairness; and that the powers conferred by clause 26 of the indenture of the 15th March, 1916, were exhausted by the creation of the first charge of \$500,000 in favour of the Canadian Bank of Commerce: *Ex p. Cowen* (1867), L.R. 2 Ch. 563; *Brown v. British Abrasive Wheel Co. Ltd.*, [1919] 1 Ch. 290; *Allen v. Gold Reefs of West Africa Ltd.*, [1900] 1 Ch. 656; *Dafen Tinplate Co. Ltd. v. Llanelly Steel Co. (1907) Ltd.*, [1920] 2 Ch. 121; *McMurray v. Northern Railway Co. and Cumberland* (1875), 22 Gr. 476.

Osler, in reply, referred to *Sidebottom v. Kershaw Lees and Co. Ltd.*, [1920] 1 Ch. 154.

W. K. Fraser, for the defendant the National Trust Company, submitted its rights to the Court.

App. Div.

1925.

M.J.O'BRIEN
LTD.

v.

BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST Co.
LTD.

App. Div
1925.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.
Ferguson,
J.A.

September 25. The judgment of the Court was read by FERGUSON, J. A.:—Appeal by the nickel corporation from a judgment of Kelly, J., dated the 12th June, 1924, declaring that certain resolutions of bondholders approving of a scheme, dated the 26th January, 1921, modifying, compromising, and altering the rights of the first mortgage bondholders under a bond mortgage dated the 15th March, 1915, held by the trust company, on the assets of the nickel corporation, and authorising the trust company as mortgagee to carry such scheme (subject to modification by a committee appointed under the scheme) into effect, ought not, as against the plaintiff, to have been carried into effect, and granting relief in accordance with the undertaking of the trust company contained in an order of Mr. Justice Middleton, dated the 30th April, 1921.

The mortgage held by the trust company for the bondholders, dated the 15th March, 1916, secured \$6,000,000 of 6 per cent. first mortgage bonds. At the time the scheme attacked was approved, holders of bonds were:—

The Government of his Britannic Majesty ..	\$3,000,000
J. R. Booth and associates	2,375,000
The O'Brien company (plaintiff)	625,000
	<hr/>
	\$6,000,000

The plaintiff's objections to the scheme divide themselves into two classes:—

1. The scheme proposed was beyond the powers conferred on the bondholders by the mortgage deed (see clause 26), in that (a) the scheme delegated to a committee, some members of which were not bondholders, the power of modifying the scheme submitted and approved; (b) that the scheme proposed to the bondholders was in fact materially modified by the committee to the prejudice of the bondholders; (c) that the scheme as proposed provided for the release and surrender of the security and the substitution therefor of any other security, rather than a modification of the bondholders' security or a compromise of their claim; (d) that, as modified and carried into effect by the committee, the scheme provided for the wiping out of all security and the substitution therefor of shares in the company, which cannot be classed as mortgage security; (e) that the power to consent to a prior charge conferred by clause (d) of para. 26 of the mortgage deed, having been once exercised, was exhausted before the scheme proposed, and could not be exercised a second time as was proposed by the scheme.

2. That in approving of the scheme the majority bondholders did not exercise their powers *bonâ fide* in the interest of the bondholders as such, in that: (a) the representatives of his Majesty's Government exercised the power to control the action of the trust company having primary regard to the interest of his Majesty's Government as contractors with the defendant nickel company to the end that his Majesty's Government might be and was relieved of onerous contracts in respect of the purchase of nickel, dated the 10th March, 1916, and 17th October, 1917; (b) that Booth did not exercise his power of control *bonâ fide* in the interest of the bondholders as a class, but was induced to vote as he did because some of the shareholders of the nickel company had agreed to transfer to him, as consideration for his vote, common shares of the company of the nominal value of \$2,000,000.

The learned trial Judge in his reasons has carefully and accurately stated the facts, and it remains to consider only whether he has drawn the proper inference as to the influences, factors, and motives which actuated or controlled the majority in exercising, by vote, their power to control the actions of the trust company.

The learned trial Judge seems to have been of opinion that the vote of neither Mr. Booth nor of the representative of his Majesty's Government would have been given in favour of the scheme had they been guided or influenced only by what was most in the interest of the bondholders as a class; and, after carefully considering the evidence, I am of opinion that such conclusion is justified and supported by the evidence; yet I have not taken quite the same view of the meaning and effect of the evidence as was taken by the learned trial Judge. He appears to have thought that Booth's approval was secured and given in consideration of the common stock, and that the approval of his Majesty's Government was influenced, if not actually secured, by the agreement to rescind the contracts which bound the Government to purchase nickel.

I am not prepared to say that the bondholders were not influenced by the factors mentioned; still I do not think it follows that either of these two bondholders was not honestly of opinion that the scheme proposed was in the interest of the bondholders as a class: and *North-West Transportation Co. v. Beatty*, 12 App. Cas. 589, puts it beyond question that mere personal interest or benefit accruing to the shareholder or one or more of the majority of a class, in addition to or differing from the benefits accruing to the minority, does not disqualify or affect the vote unless it be established and found that the benefiting members of the class did not honestly and in fact believe the transaction authorised or approved

App. Div.

1925.

M.J.O'BRIEN

LTD.

v.

BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.Ferguson,
J.A.

App. Div.
 1925.
 M.J.O'BRIEN
 LTD.
 v.
 BRITISH
 AMERICA
 NICKEL
 CORPORATION
 LTD. AND
 NATIONAL
 TRUST CO.
 LTD.
 Ferguson,
 J.A.

by the majority to be in the interests of the corporation whose action they by their votes controlled, or of the class for whose benefit or protection they are enfranchised. See also *Goodfellow v. Nelson Line (Liverpool) Ltd.*, [1912] 2 Ch. 324.

A careful consideration of the whole evidence, in the light of the arguments of counsel, leads me to the conclusion that neither the bondholders whose votes are attacked voted as they did because they thought the proposed scheme improved their security or better protected their investment or the investment of the bondholders as a class, or because the changes or modifications proposed by the scheme were necessary to the protection of their security, or because the changes proposed by the scheme were in the financial interest of the mortgagees and their *cestuis que trust* as such, but rather because they felt that a refusal to approve of the scheme must result in a large and serious loss to the creditors who had invested their moneys in the debentures and shares of the company, most of whom were Norwegian investors. It seems to me that the majority bondholders were of opinion that, in the circumstances surrounding the formation of the nickel company, the purchase of its mines and the flotation of its securities to secure capital used to develop and improve the mortgaged premises, and in this way to feed and better the security of the first mortgagee bondholders, it would be harsh to adopt Mr. O'Brien's suggestion of foreclosing or buying in, and thus to realise their mortgage moneys out of the property improved and to a large extent created by the moneys of these foreign investors, and that, impelled by a desire to deal honourably and fairly with these foreign investors rather than by a desire or intention to do what was in the financial interest of the bondholders as such, these two members of the class knowingly and intentionally voted to take a chance and to give the debtor and its other creditors less onerous conditions and more generous treatment than it was safe or in the financial interest of the bondholders as a class to grant, and the question is: May the bondholders exercise their franchise for such a purpose?

I am of opinion that the answer must be that they may not, and that such an exercise of the franchise, looked at from the point of view of the minority bondholder, is improper, in that it conflicts with their duty to him. The duties, powers, or obligations of a majority in voting to bind a minority have been discussed and considered in many cases. I have already referred to the *Beatty* case, but that only deals with one aspect of this case—the other aspects are, I think, covered by *Ex p. Cowen*, L.R. 2 Ch. 563, and *Allen v. Gold Reefs of West Africa Ltd.*, [1900] 1 Ch. 656, accepted as correctly stating the law in the more recent cases of

Dafen Tinplate Co. Ltd. v. Llanelly Steel Co., [1920] 2 Ch. 124, App. Div.
and *Brown v. British Abrasive Wheel Co.*, [1919] 1 Ch. 290.

1925.

In the *Cowen* case, Lord Cairns, L.J., at pp. 569, 570, said:—

“It was much pressed in argument that, wherever the Court finds a deed to be unreasonable in its provisions, it will be treated as invalid, and that it is unreasonable if the amount of composition be not in fair proportion to what the debtor is able to pay. But in my opinion there is a statutory power given to the majority of the creditors to bind the minority. They are made the judges of the propriety of the arrangement, so long as they exercise their power *bonâ fide*; and it certainly seems to me that it would be contrary to the spirit of the Act that this Court should sit in review on their decision as regards the *quantum* of composition they may agree to accept. But this is subject to the paramount obligation that this power, like all other powers, must be exercised fairly, so that there may be a *bonâ fide* bargain between the creditors and the debtor. If it should be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found that there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.

“The present case, in my opinion, falls within one or other of these two categories. If the debtor’s own statement be taken literally, I should think there was an understanding that if the creditors would execute the deed, and so defeat the judgment creditor, they should be paid all their demands in full: this would be a fraud. But if not, the only other conclusion is, that these assenting creditors, being connected with the debtor, or his personal friends, and wishing to shew kindness and generosity to him, were content to take this nominal composition, and to give him his discharge. In that case, although the transaction might not amount to a fraud, yet it was not a *bonâ fide* bargain and could not bind the minority. In either view of the case, therefore, the Commissioner was right, and the appeal must be dismissed with costs.”

In *Allen v. Gold Reefs of West Africa Ltd.*, [1900] 1 Ch. at pp. 671, 672, Lindley, M.R., said:—

“The power thus conferred on companies” (see the Companies Act, 1862, sec. 50) “to alter the regulations contained in their

M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST CO.
LTD.
Ferguson,
J.A.

App. Div.
 1925.
 M.J.O'BRIEN
 LTD.
 v.
 BRITISH
 AMERICA
 NICKEL
 CORPORATION
 LTD. AND
 NATIONAL
 TRUST CO.
 LTD.
 Ferguson,
 J.A.

articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of sec. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bonâ fide* for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it."

If the foregoing propositions of law be applied to the view of the facts taken by the learned trial Judge, or to the view I have taken and expressed, it seems to follow that the majority did not exercise their franchise to protect or benefit the security, and therefore they did not exercise the power *bonâ fide* in the interests of the class.

That brings us to the question of *ultra vires*. The answer to that question turns not on the fairness or unfairness of the scheme, but on the meaning of the wording of the bond mortgage and the scheme as proposed, rather than on the scheme as modified by the committee and as carried into effect; for, as I see the situation, the order of Mr. Justice Middleton of the 30th April, 1921, eliminates from our consideration anything that happened after the adoption of the scheme.

I have, on a careful perusal of the bond mortgage, been unable to find anything that authorises the bondholders to delegate their power to control the action of the trustee or to bind the minority, and, as I understand him, Mr. Osler did not argue that there was power to delegate anything other than ministerial acts. His argument was that the scheme conferred only ministerial duties and powers on the committee. I am unable to read para. 23 of the scheme as being so limited. That paragraph reads:—

"This scheme may be modified in such manner as the said committee may unanimously approve should any such modification appear to them desirable in the interest of the holders of the said first mortgage bonds and of the said debenture stock of the corporation."

Clearly this paragraph gives to the committee wide discretionary powers.

That brings us to the meaning and effect of proviso (d) of para. 26 of the bond mortgage. This proviso reads:—

"(d) Power to accept any other securities of the corporation in lieu of the bonds hereby secured, or to consent to an issue of securities of the corporation constituting a prior charge to these presents and to the bonds hereby secured."

It is admitted that prior to the scheme the power to consent to a prior charge had once been exercised, and the question is: Can the power be again exercised so as to permit of the discharge of the charge previously authorised and given and the substitution thereof of a mortgage or charge for a larger amount, the additional moneys or bonds to be appropriated and used for paying or securing liabilities not covered by the mortgage or charge to be discharged? On my reading of it, para. 26(d) confers a power to consent only once. This power was therefore exhausted prior to the proposed scheme.

For these reasons, I am of opinion that the scheme was not legally approved and also that it was *ultra vires* in the respects I have mentioned, and that the appeal fails.

Appeal dismissed with costs.

App. Div.
1925.
M.J.O'BRIEN
LTD.
v.
BRITISH
AMERICA
NICKEL
CORPORATION
LTD. AND
NATIONAL
TRUST Co.
LTD.
Ferguson,
J.A.

[APPELLATE DIVISION.]

BENN V. HAWTHORNE.

1925.
Sept. 25.

Will—Mutual Wills Made by Father and Son—Purchase by Son of Property of Father—Alleged Oral Agreement of Father not to Revoke Will—Establishment against Executors of Father—Onus—Parol Evidence—Animus Contrahendi—Corroboration.

The judgment of ORDE, J.A., 55 O.L.R. 393, was reversed and the action dismissed (HODGINS, J.A., dissenting), upon the ground that the oral agreement alleged by the plaintiff to have been made by him with his father, whereby the father undertook not to alter the terms of his will, was not established by the evidence adduced in the action brought after the plaintiff's father's death against the father's executors.

The onus was on the plaintiff to prove the agreement strictly; and that involved not only strict proof of its terms, but also proof of an *animus contrahendi* on the part of the father, and clear and satisfactory evidence corroborative of the plaintiff's evidence.

The principles enunciated in *Orr v. Orr* (1874), 21 Gr. 397, *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, and other cases, applied.

APPEAL by the defendants from the judgment of ORDE, J.A., 55 O.L.R. 393.

October 13, 14, 27, and 28, 1924. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

App. Div.

1925.

BENN
v.
HAW-
THORNE.

W. E. Raney, K.C., and A. W. Marquis, K.C., for the appellants, argued that no parol agreement between the testator and the plaintiff had been proved. There was no sufficient corroboration of the plaintiff's evidence on this point: *Orr v. Orr* (1874), 21 Gr. 397; *Walker v. Boughner* (1889), 18 O.R. 448, at p. 454; *Smith v. Smith* (1898), 29 O.R. 309; *Cross v. Cleary* (1898), 29 O.R. 542; *Wingrove v. Wingrove* (1915), 8 O.W.N. 21; *Gallinger v. Gallinger* (1920), 48 O.L.R. 590; *Mitchell v. Cook* (1923), 25 O.W.N. 25; *Maunsell v. White* (1854), 4 H.L.C. 1039; *Sanderson v. Burdett* (1871), 18 Gr. 417; *Bateman v. County of Middlesex* (1911-12), 24 O.L.R. 84, 25 O.L.R. 137, 27 O.L.R. 122; *Kinsman v. Kinsman* (1912), 4 O.W.N. 20, 7 D.L.R. 31. Counsel then argued that the Statute of Frauds was a complete defence: *Alderson v. Maddison* (1881), 7 Q.B.D. 174. Part performance here did not take the case out of the statute: *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Wallace v. Long* (1885), 105 Ind. 522; *Pond v. Sheean* (1890), 132 Ill. 312, at p. 321; *Ellis v. Cary* (1889), 74 Wis. 176; *Dicken v. McKinley* (1896), 163 Ill. 318; *Stahl v. Stevenson* (1918), 102 Kans. 447; *Horton v. Slegmyer* (1910), 175 Fed. Repr. 756; *Laughnan v. Laughnan's Estate* (1917), 162 N.W. Repr. 169; *Hensley v. Hilton* (1921), 131 N.E. Repr. 38; *Gould v. Mansfield* (1869), 103 Mass. 408; *Archibald v. McNerhanie* (1899), 29 Can. S.C.R. 564; *Humphreys v. Green* (1882), 10 Q.B.D. 148; *Caton v. Caton* (1865), L.R. 1 Ch. 137; *Hodson v. Heuland*, [1896] 2 Ch. 428; *Turner v. Prevost* (1890), 17 Can. S.C.R. 283. Counsel also contended that there was no consideration for the alleged promise of the father not to change his will, and that, the agreement to purchase the property having been reduced to writing, the plaintiff could not by parol evidence add a term to the agreement: *Long v. Smith* (1911), 23 O.L.R. 121; *Morgan v. Griffith* (1871), L.R. 6 Ex. 70; *Erschine v. Adeane* (1873), L.R. 8 Ch. 756. Counsel also urged that this was a case where the Court might well reverse the learned trial Judge's findings of fact: *Newton v. Botsford* (1918), 43 D.L.R. 330; *Austin & Nicholson v. Canada Steamship Lines Ltd.* (1919), 15 O.W.N. 371; *Bennett v. Perrault* (1922), 68 D.L.R. 164.

A. Courtney Kingstone, K.C., for the plaintiff, respondent, contended that the learned trial Judge's finding of fact that an enforceable agreement between the parties had been proved should not be disturbed. On the question of the admission of parol evidence, counsel contended that the father's promise not to revoke his will had the effect of a contract collateral to the other, of which extrinsic parol evidence might be given: *Morgan v. Griffith*, L.R.

6 Ex. 70. The Statute of Frauds had no application: *Bligh v. Galagher* (1921), 57 D.L.R. 76; *Roberts v. Hall* (1881), 1 O.R. 388; *Ridley v. Ridley* (1865), 34 Beav. 478; *McGugan v. Smith* (1892), 21 Can. S.C.R. 263; *Murdoch v. West* (1895), 24 Can. S.C.R. 305; *Synge v. Synge*, [1894] 1 Q.B. 466; *Hammersley v. Baron de Biel* (1845), 12 Cl. & F. 45; *Stickland v. Aldridge* (1804), 9 Ves. 516. As to consideration for the father's promise, the burden of the risk taken by the son was adequate consideration.

App. Div.

1925.

BENN

v.

HAW-
THORNE.

September 25, 1925. MULOCK, C.J.O.:—This is an action to enforce an alleged parol agreement of the testator, J. H. Benn, not to revoke his will, and was brought by his son, W. D. Benn, against the testator's executors.

J. H. Benn, the testator, was a retired farmer living in the city of St. Catharines. His wife died on the 12th May, 1919, and he remained a widower until his death. He had two children, the plaintiff and a daughter, Edna Ravelle Hunter.

In the month of November, 1919, a discussion took place between the plaintiff and his father as to their making their wills, and it resulted in each making, on the 24th November, 1919, his will largely in the other's favour.

The son by his will gave a legacy of \$5,000 to the Hospital for Sick Children and the residue of his estate to his father; and the father by his will gave to the Women's Missionary Society \$500; to his sister \$1,000; to his brother \$1,000; and the residue of his estate to his son, the plaintiff.

The father owned an undivided one-fifth interest in a certain property on Adelaide street in the city of Toronto, but the revenue therefrom was insufficient to meet the interest on a mortgage thereon, taxes, repairs, and other outgoings. The son swore that his father had been pressing him to buy this one-fifth interest, but that he declined to do so, and that on the evening of the 10th July, 1921, at the Oban Hotel, in the town of Niagara-on-the-Lake, the father, in the presence of Mrs. Harvey and her daughter, now wife of the plaintiff, handed to him a paper in the father's handwriting, worded so far as his son remembers as follows:—

"I hereby agree to purchase from my father J. H. Benn his one-fifth interest in number 17 and 19 Adelaide street west. I to pay \$500 in cash and give a mortgage for \$4,500 and to assume one-fifth of the \$13,000 mortgage, also one-fifth of the overdraft amounting to \$4,749."

The plaintiff swore that, having read the paper, he shook his head, signifying his refusal to buy (the father was completely deaf), whereupon the father said: "Wellesley, I want an answer and I

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

want it now; you can take your choice. If you purchase this property on those terms I will agree in consideration of your doing so that my will as made in 1919 will remain unchanged to my death; on the other hand, if you do not purchase this property I will make a new will, practically disinherit you or cut you off." ("I don't recall the term he used.") He said: "Furthermore you may save yourself the trouble of coming to see me." The plaintiff swore that he then signed the paper. It was not produced at the trial.

On the 22nd December, 1922, the father revoked his will of November, 1919, and by his new will he directed to be cancelled the mortgage made by the plaintiff to him for \$4,500, and also the interest thereon, upon the Adelaide street property. The balance of his estate he disposed of by bequeathing certain sums to charities; \$2,000 each to his brother Alfred, his sister Sofia, his sister Charlotte, and his cousin Laura; and he directed that if, after payment of the legacies, including \$500 each to his executors, there should be any residue it should be added to the legacy given to the Missionary Society of the Methodist Church, Toronto. In this will he says:—

"My children are well provided for under their grandfather's will, otherwise they would be more liberally dealt with in this will, besides they have neglected me in my old age."

At the time of his death the testator was 73 years of age.

The plaintiff alleges that the parol agreement of the father not to revoke his will induced him to purchase the property in question. If it did, there are two contracts, the main contract by the plaintiff to purchase and the collateral contract by the father that if the plaintiff purchased he would not revoke his will, the parol agreement forming part of the consideration for the plaintiff purchasing the property.

Discussing such collateral contracts, Lord Moulton in *Heilbut Symons & Co. v. Buckleton*, [1913] A.C. 30, at p. 47, says:—

"It is evident, both in principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration of the main contract by £100, and the more natural and usual way of

carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter."

These observations were made in an action wherein it was attempted to establish a collateral parol agreement between strangers against a living person who was in position to give his own testimony against the claim. Much greater is their force in the present action, which is based upon an alleged parol collateral agreement made by the deceased and now being prosecuted against his estate.

Orr v. Orr, 21 Gr. 397, was a suit for the specific performance of a parol agreement between a son and his mother, a widow, the owner of a farm. On the death of the father, the mother and children—including the plaintiff, the eldest son—resided on the mother's farm, and the trial Judge held that the plaintiff had established a parol agreement with the mother that if he would remain on the farm and assist her to bring up the children and would support her during her life she would give him one-half of the farm. The trial Judge, the late Chancellor Spragge, held that the evidence established a parol agreement, and decreed specific performance, but the decree was reversed on appeal.

At p. 415, Richards, C.J., says:—

"Whenever an attempt is made to set up a parol agreement between a parent and child as to the disposition of the property of the parent, I think the only safe rule to adopt in a country like this is, that the agreement shall be sustained by clear and satisfactory evidence. If such an agreement is attempted to be enforced after the death of the parent, and the oath of the party desiring to support the agreement is offered for that purpose, his evidence must be sustained by satisfactory confirmatory proof."

And at pp. 424, 425, 426: "I think it will cause great and serious mischief through this country (where so large a portion of the population are farmers owning their own land), if it is

App. Div.

1925.

BENN
v.
HAW-
THORNE.

Mulock,
C.J.O.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

understood that conversations in the family or amongst neighbours as to how the farm is to be divided when the father dies, are to be taken as constituting a contract which can be enforced in Equity. . . . If children are not disposed to reside with their parents and give to them that comfort and assistance which their duty requires, trusting to the affection of the parent to bestow on them a share of their world's goods, then, if they wish to shew that an *agreement* has been made which is to bind the parent by force of law and not by the better feeling of affection, Courts ought to require that such agreements shall be established by the clearest evidence; and it should be held to be an almost invariable rule, when a parent tells a child that if he lives with him and works the farm he will give it to him, that the child is to understand, unless it is unmistakably shewn that the parent intends to bind himself so that he cannot change that intention, it will be considered that all he means to say is, that those are his views and intentions, but he will feel himself perfectly at liberty to alter that disposition of his property, if he finds his own altered circumstances or want of kindness or affection on the part of his son induces him to change his views."

In the same case (at pp. 445, 446) Blake, V.-C., says:—

"The Court should be very slow to act upon the statement of one of the parties to a supposed agreement after the death of the other party; and such corroborative evidence should be adduced as to satisfy the Court of the truth of the story told, which is, as here, to benefit so materially the person telling it. To my mind the circumstances detailed in evidence so far from corroborating the allegations in the bill negative them, and lead to the conclusion that, although apparently the plaintiff is a person worthy of credit, his case must be taken to be disproved."

And, dealing with the question of reversing the trial Judge on his finding of fact, Blake, V.-C., says (p. 451):—

"Wherever merely the question as to the credibility of one witness as against another, or of several witnesses as against others, is to be decided, there the finding of the Judge of first instance should be followed. But I do not think the rule should be extended. It is not reasonable that so great a responsibility should be cast upon the shoulders of the Judge of first instance; nor is it right to deprive the party aggrieved of the opinions of the Judges of the appellate Court in regard to questions of fact; and to substitute the conclusion of one Judge for that of six."

In *Newton v. Bolsford*, 43 D.L.R. 330, Fullerton, J.A., at p. 333, says:—

"The rule undoubtedly is that where a finding of fact is made by a trial Judge depending on the credibility of the witnesses examined before him, a court of appeal will not disturb the finding. When, however, there are other circumstances in the case, for example, documentary evidence, which shew that the story of any particular witness is unworthy of belief, a court may be justified, under the authorities, in reversing the finding of the trial Judge."

Cross v. Cleary, 29 O.R. 542, was a suit brought by the plaintiff against the executors of a will in which the plaintiff sought to recover the whole of the testator's estate, upon the strength of a verbal agreement which she alleged was made between her and the deceased. The plaintiff's evidence was that the deceased said to her, "You give me a home as long as I live, and when I die you have what is left;" to which she answered, "All right." And he then said, "That is an agreement." The same story was told by the plaintiff's daughter and son-in-law, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died.

Street, J., delivering the judgment of the Divisional Court, dismissing the plaintiff's action, said (p. 545):—

"In my opinion, such an agreement as that set up by the plaintiff must be supported by evidence leaving upon the mind of the Court as little doubt as if a properly executed will had been produced and proved before it. There may possibly be cases in which the absence of written evidence of the whole terms and consideration for such an agreement might be pardoned, but I cannot at present imagine such a case, and I should be sorry, for my own part, ever to find myself constrained to act upon the mere recollection of any number of witnesses, unsupported by a complete written record of an agreement which is to take the place of a will."

From the principles enunciated in the above mentioned cases it is clear that in order to succeed the plaintiff must prove strictly the alleged parol agreement. This involves proving strictly not only its terms but also an *animus contrahendi* on the part of the father, and there must also be clear and satisfactory evidence corroborative of the plaintiff's evidence. The deceased was methodical and precise in his business dealings, and the plaintiff on his cross-examination swore that his father was absolutely honest and honourable in business.

On his examination for discovery the plaintiff gave as his reason for signing the paper, "Well my father had been such

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Mulock,
C.J.O.

App. Div.

1925.

BENN
v.HAW-
THORNE.Mulock,
C.J.O.

close friends with me for so long that I hated to see any break in the family, so I signed the paper, and consequently the deal went through."

At the trial he added another reason, namely, that "the amount of the purchase was not sufficient to warrant me in forfeiting my rightful inheritance."

His reason also appears from the following extracts from his cross-examination:—

"Q. 'On the other hand, if you will not buy this property, I will make a new will, or disinherit you.' I think that was what you said? A. I think he used the words 'practically cut you off.'

"Q. What happened after that? A. I felt there was no alternative, so I signed the paper and handed it back to my father . . . I felt that was a wise thing for me to do."

Thus on his examination for discovery he gives affection for his father as his reason for signing. On his examination in chief he gives affection and self-interest, and on his cross-examination, self-interest alone. I refer to these different reasons merely as having a bearing upon his credibility.

The plaintiff swore that after signing the paper he handed it to his father and that when the transaction was completed his father destroyed it.

On the plaintiff's cross-examination he said there was nothing in this paper with reference to the will. He also stated that he had requested Mrs. and Miss Harvey to remain and hear what was said at this interview. Asked on his examination for discovery if he mistrusted his father, he said: "No, I never had any grounds to distrust my father; I never had any occasion to distrust my father's honour."

The plaintiff on his examination for discovery and on his cross-examination at the trial purported to give the exact words used by his father and which he relies upon as constituting the parol agreement. There are slight differences in the language of the two conversations though not in the substance of the words thus attributed to the father, but differences sufficient to shew uncertainty as to the *ipsissima verba* used by the father.

Mrs. Benn, formerly Miss Harvey, wife of the plaintiff, gave evidence in his behalf. Her examination in chief is entitled to little weight. Instead of being asked to state what was said by the father, she was asked if she had heard the evidence given by her husband and her mother, and she said that she had. She was then asked: "Q. Do you agree with everything that they said? A. Yes."

On cross-examination she said:—

“The old gentleman said: ‘Wellesley, you can have your choice; if you accept the agreement I will agree in consideration of your doing so that my will—my will as made in 1919—will remain unchanged to my death. If you don’t I will practically cut you off or disinherit you.’”

“Q. Did he say ‘practically cut you off or disinherit you?’

A. I cannot just remember exactly what was said. I remember him making that remark ‘practically cut you off or disinherit you,’ something to that effect.”

This witness gave her evidence in November, 1923, and purported to state the exact words used by the father in July, 1921.

A comparison of the language of the father as deposed to by her and by her husband, the plaintiff, convinces me that there was careful rehearsal by the plaintiff and his wife before the trial with reference to the version to be deposed to by each of them.

It is helpful to put side by side the versions of the husband and wife as to the words used by the father. The husband’s version is as follows:—

“‘You can take your choice. If you purchase this property on those terms *I will agree in consideration of your doing so that my will as made in 1919 will remain unchanged to my death.* On the other hand, if you do not purchase this property I will make a new will and practically disinherit you (or cut you off’). And he said furthermore: ‘You may save yourself the trouble of coming to see me.’”

The wife’s version is as follows:—

“Wellesley, you can have your choice. If you accept this agreement *I will agree in consideration of your doing so that my will will remain—my will as made in 1919 will remain—unchanged to my death.* If you do not I will practically cut you off or disinherit you.”

“Q. Did he say ‘practically cut you off or disinherit you?’ A. I cannot just remember exactly what was said.”

These two versions of the alleged agreement are verbatim the same. The husband and wife each say that the father said, “I will agree in consideration of your doing so that my will as made in 1919 will remain unchanged to my death.”

It is, in my opinion, unbelievable that these two witnesses when in the witness-box honestly remembered and testified to the very words uttered by the father over two years previously. Further, they each gave the same order to the utterances of the father. The precision in the words attributed to the father indi-

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Mulock,
C.J.O.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

icates legal training or careful study. A layman would not, in my opinion, especially off-hand in conversation, so express himself.

The evidence of the plaintiff and his wife is specific; it does not admit of any finding that the father expressed himself differently. Unless, therefore, the Court finds that the father used the very words sworn to by these two persons, and no other words, the Court is, so far as depends on their evidence, entirely in the dark as to what the father said. I am unable to believe that any two persons who might have heard the words uttered by the father on the occasion in question would have been able, after a lapse of over two years, to repeat correctly word for word his alleged utterances. That the plaintiff and his wife in the box professed to do so is more than suspicious. I am satisfied that their versions were the result of deliberate study and rehearsal and that their evidence should be rejected.

It is to be observed that, whilst the plaintiff swore to remembering with absolute accuracy the very words of the alleged parol agreement, his memory did not enable him to say whether the father referred to the will as made in November, 1919, or merely in 1919, nor whether the threat which followed was to disinherit him or cut him off, but that the words used were "practically cut you off." Further, he could not remember whether the paper handed by his father to him to sign, and which he signed, referred to the will, but thought it did not. On such an important point as this it is difficult to understand how the plaintiff, if possessed of such a sound memory as his previous evidence suggests, had any uncertainty as to whether or not the signed paper referred to the will. Further, if he was able to remember, as he professed to have done, with absolute accuracy, the very words of the alleged promise, I fail to understand how he could have any doubt as to the remaining few words of the father's statement.

Mrs. Harvey, mother of the plaintiff's wife, was present when the plaintiff signed the agreement to purchase, and her evidence was that the father "made some remarks about he" (the plaintiff) "had his choice of signing that agreement or he would disinherit him or something of that kind. I could not tell you exactly but it amounted to that same thing.

"Q. Was there any alternative held out to him if he signed the agreement? A. The alternative was that he would leave his will as made in 1919 to remain.

"Q. Did he make that statement in 1922? (Apparently referring to the above quoted statement). A. Yes.

"Q. On one occasion or more than one occasion? A. On many occasions."

On cross-examination she stated that she read the paper which the plaintiff was asked to sign and then handed it over to her daughter or Mr. Benn, she could not remember which.

"Q. What was done with it? A. Wellesley Benn shook his head, no.

"Q. Did he have the paper in his hand? A. I do not know whether he had the paper or whether he laid it on the table.

"Q. You think he laid it on the table? A. I cannot remember really; I was not interested.

"Q. You were not paying much attention? A. I was not paying much attention because I was not directly interested in it.

"Q. Then what happened after Wellesley shook his head? A. Mr. Benn said, 'Wellesley, you may have your choice of signing this agreement or I will'—it was either 'disinherit you' or 'cut you off' or something of that kind. 'But if you do sign it I will allow my will to stand as made in 1919.'

"Q. Did he say November, 1919? A. I do not remember that. And he furthermore said that he need not come to see him again."

Asked when she had discussed the matter with the plaintiff, she said at first that she did not remember having done so, and then she explained that she meant in the summer of 1921; but she admitted doing so after the death of the deceased, which occurred in May, 1923.

"Q. Did he (referring to the plaintiff) ever ask you if you remembered it? A. I do not know; we have frequently discussed it. I have heard him discussing about the Adelaide street property, and I do not remember anything very definite. Just generally discussed."

From the foregoing extracts from the evidence of Mrs. Harvey it appears that she was not paying much attention to what transpired at the meeting and had forgotten some things; yet 28 months after the meeting of July, 1919, she purported to state in the witness-box, word for word, portions of the language attributed to the father. It is, I think, incredible that Mrs. Harvey—not being interested in what was transpiring and paying little attention to the occurrences of the meeting—could at the trial have accurately remembered any substantial portion of the language used by the deceased. Her version corresponds closely with that of the plaintiff, and doubtless owes its origin to the frequent discussions had with him. My observations as to study and rehearsal by the plaintiff and his wife are also applicable to Mrs. Harvey, unless it be—which is possible—that the plaintiff in the course of his frequent discussions with her between May

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Mulock,
C.J.O.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

and November, 1923, convinced her that she really remembered what she testified to in the box. In either event her evidence cannot be safely accepted. It is not of that clear and satisfactory character which is essential in order to prove a parol agreement against the estate of a deceased person.

I now proceed to consider occurrences subsequent to the July meeting. The plaintiff went to Toronto, and upon his instructions the deed from the father to the son and the mortgage back were prepared by the plaintiff's solicitor. No reference was made in the deed to the alleged collateral agreement; and on or about the 20th July, 1919, the plaintiff and his father attended at the law office of J. H. Campbell, a practising barrister at St. Catharines, where the papers were executed and taken possession of by the plaintiff. The plaintiff swore that in Mr. Campbell's office the father said, "Whatever I have at my death will go to my son, we have entered into an agreement to that effect." Mr. Campbell, a witness for the plaintiff, swore that the father was quite garrulous and that what the plaintiff said in the box was substantially true "as I remember it." On cross-examination Mr. Campbell said, "The old man made a statement something to the effect that he had made a bargain or agreement with the young man about not changing his will, and it would be all right—that is my recollection." He could not say whether this was before or after the papers were signed.

I infer from certain expressions of Mr. Campbell when in the witness-box that his recollection of the occurrences in his office is not wholly clear. The following are extracts from his examination:—

"My recollection of the matter is this. To the question, 'Was there any discussion as to how the transaction came to be entered into?' his answer was, 'As I recollect it, the two parties . . . '."

What the plaintiff said in the box was, "substantially true as I recollect it." To the question, "What else occurred?" he answered, "I have some recollection of speaking something about the boy in the War in connection with . . .

"Q. I meant bearing on the matter in question? A. There was not very much said about that.

"Q. What other discussion was made or took place in connection with this matter? A. Well, I do not think there was very much as to the deal.

"Q. What was there? A. My recollection is that when I made this statement to the young man he made some statement that he would be just as well pleased if there was nothing to it

or if the old man would back out or something of that nature, the exact wording I do not pretend to remember.

"Q. Go ahead? A. And then Mr. Benn (the father) as I recollect it made the statement . . ., or words to that effect. And then my recollection is that when relayed . . . I perhaps think that I relayed, that is my recollection. Then the old man made a statement, something to the effect that he had made a bargain or agreement with his son about not changing his will."

To succeed, the plaintiff must prove strictly an absolute agreement for valuable consideration by the father not to change his will. "Something to the effect that he had made such an agreement" is not sufficient; "something," as here used, is a qualifying term; nothing less than an unqualified and binding agreement is sufficient.

So far as appears from Mr. Campbell's evidence, the agreement testified to was a voluntary one. There is nothing in Mr. Campbell's evidence corroborating the agreement set up by the plaintiff. The statement which the plaintiff said his father made in Campbell's office, namely, "Whatever I have at my death will go to my son, we have entered into an agreement to that effect," is no more than a statement of an intention. Even if the plaintiff's testimony was evidence of a binding agreement, Campbell's evidence cannot be regarded as satisfactory corroboration. Whilst the plaintiff says that his father agreed that, in consideration of the plaintiff buying the property, the father would not revoke his will, Mr. Campbell's evidence at one place merely amounts to this, that the father said that whatever he had at his death would go to his son, that they had entered into an agreement to that effect, that he had made a bargain or agreement with the young man about not changing his will, and it would be all right. Neither of these statements is corroborative of the bargain testified to by the plaintiff. Each statement would be quite correct if the only bargain mentioned by the father was a wholly voluntary one.

Mrs. Annie Hunter, an old acquaintance of the father, swore that she, the plaintiff, and his father were passengers one day on the steamer leaving Toronto for Niagara, in the summer of 1922: that the three were sitting together when the father sent the plaintiff to get some cigars, and that while the plaintiff was away the father said to her: "I am very much worried respecting my business and money; however, I have got Wellesley to buy some Toronto property, and thus it will relieve me a good deal. The property at the present time is not very valuable, it was not carrying itself, but it will ultimately be all right, and anyway I have

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Mulock.
C.J.O.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

made an agreement with Wellesley that everything I have practically goes to him when I go." The witness continued: "I won't say those were the exact words, but that is practically what it was, that 'everything I have will go to Wellesley when I go.'" Wellesley returning, she says, the father ceased talking.

The statement of the father as deposed to by Mrs. Hunter, like that deposed to by Campbell, amounts merely to the admission of a voluntary agreement and is not corroboration of the agreement for valuable consideration set up by the plaintiff, and like Campbell's evidence is merely a manifestation of an intention—not of a binding contract—to allow his will to remain unrevoked. Entertaining this view of the effect of the agreement to which Mrs. Hunter testified, it is unnecessary for me to comment upon her evidence. I may, however, observe that, after stating the words which she says the father used, she added that she would not "say those were the exact words," and she then proceeds to state what was, in her opinion, their meaning. I do not think that the statement of a witness such as Mrs. Hunter as to the meaning of the language of a deceased person is satisfactory proof of the language itself. It does not appear that the subject of the father's affairs had been under discussion when his son left Mrs. Hunter and himself, and it therefore seems to me extraordinary that the father, without anything having been said leading up to it, should have made the statement deposed to by Mrs. Hunter, and I regard her evidence with grave suspicion, and for the various reasons above mentioned consider it is wholly insufficient corroboration of the plaintiff's story.

I will now deal with certain matters subsequent to the execution of the papers. Up to the 2nd August, 1921, the father had received neither the mortgage nor the cash payment of \$500, and upon that day he wrote to the plaintiff complaining of the delay. In this letter he said:—

"If I should have occasion to change my will, which is the most unlikely thing conceivable, I will see that you lose nothing by your purchase, don't be afraid of that. Please see to the matter of placing the papers in my hands at once, as I am worrying about them."

The son received this letter, but did not answer it or in any way intimate to his father that he was not free to revoke his will. The plaintiff's reason for not having done so was, he says, because of the following interpretation which he says he placed upon his father's letter:—

"My father had left some small sum to a brother and to a sister and also a little to charity, and I thought that what he

meant there was in case one of these—either brother or sister—should predecease him he might transfer that legacy to somebody else or to the other one. That was my interpretation I thought his idea was that in case, for instance, the brother should die, he would perhaps leave the \$2,000 to the sister, or if the sister should die, he would leave the \$2,000 to the brother; it would not in any way disturb my interest in the will. That was my interpretation.”

The father's letter is not, I think, reasonably open to the interpretation placed upon it by the plaintiff. It seems to me to be a plain intimation to him that his father considered himself under no obligation not to change his will, and the son's excuse for not commenting to his father upon his possibly doing so is not a reasonable excuse, and therefore his conduct in allowing the father's statement to pass unnoticed and in thereafter completing the transaction by payment of the money and delivering the mortgage is evidence against him. Further, it is a significant circumstance that the father neither signed nor was requested by the plaintiff to sign any paper shewing the alleged bargain.

Judging from his evidence, the plaintiff appears to be a careful and well-informed business man, and when his father, as he says, was urging him to sign the paper to buy the property, and promising that if he did he would leave his will unrevoked, then was a proper time and it would have been reasonable for the plaintiff to have added the father's promise to the paper. There is no evidence that he suggested such an addition to it. Again, there was another suitable occasion for the reduction to writing of the father's alleged promise, namely, when the deed from the father to the plaintiff was being prepared. It was drawn, as already pointed out, by the plaintiff's solicitor, upon the plaintiff's own instructions. If the plaintiff was under the impression that his father was bound not to revoke his will, it is reasonable to suppose that the plaintiff would have mentioned that circumstance to his solicitor when giving instructions for the preparation of the deed and mortgage, and that the solicitor would have advised the agreement being put in writing. There is no evidence that the plaintiff mentioned the matter to his solicitor; and, if he did not do so, it may fairly be inferred that he did not consider the father bound. The plaintiff said that his father was a strictly honourable man, and he may therefore have considered a written agreement unnecessary; but, if his father was strictly honourable and had made the alleged promise to his son, it is improbable that he would have broken it.

On the 11th August, 1921, the father wrote to the plaintiff

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Mulock.
C.J.O.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

pointing out that the deed contained no mention of the plaintiff's agreement to be responsible for the father's share of certain claims over and above the \$13,000 mortgage on the property in question, and he enclosed for his son's signature an undertaking to assume such responsibility. The plaintiff did not sign the undertaking, and the father by letter of the 24th August, 1921, wrote to the plaintiff as follows:—

"Dear Wellesley: I greatly regret that there should be any misunderstanding between my only son whom I greatly love and myself concerning the real estate deal between us. And to help to dispel the misunderstanding, I must remind you of the agreement entered into by you repeated several times that you would meet any claims against the property that might justly be made should you get it at the very low figure which you offered, which you did. I must remind you too that I wanted to go to Toronto with you to instruct the lawyer as to the terms of the sale—surely it was the seller's right to do this, but you would not hear of it. And, oh! Wellesley, what an awful mistake you made—according to the deed and mortgage you were buying from me the entire property, whereas you knew perfectly well that I only owned the $\frac{1}{5}$ bequeathed to me by your mother. Don't be a fool Wellesley to antagonise your father, who in a few days will be in his 73rd year and is now in a very poor state of health. Send me on the agreement signed and witnessed. I want it to save any possible disputing with the trust company. Don't kill the goose that lays the golden egg. Keep your promise and come and see me.

"Your affectionate father,

"J. H. Benn."

According to the plaintiff's evidence, his father fixed the price for the property, and by threat of disinheriting him induced him to purchase. But the father's statement in this letter gives a different colour to the transaction, namely, that the son made an offer of a low figure for the property and got it at that figure. The plaintiff did not challenge the correctness of the father's statement in this respect. In this letter the father states that he wished to go with the plaintiff to Toronto to give instructions to the solicitor as to the terms of the sale, but that the plaintiff would not hear of it. The plaintiff swore that his father was unwilling to go to Toronto.

The plaintiff was bound to prove strictly the alleged parol agreement, or to have his own evidence corroborated by other material evidence: the Evidence Act, sec. 12.

For the reasons above set forth, I am of the opinion: (a) that

(irrespective of his duty to prove to the satisfaction of the Court an *animus contrahendi* he has not discharged such onus; and (b) that he has not shewn an *animus contrahendi* on the part of the father; and that for each reason the appeal should be allowed, the judgment set aside, and the action should be dismissed, with costs here and below.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Mulock,
C.J.O.

MAGEE, J.A.:—I agree so fully with the analysis of the evidence made by my Lord and with his reasons and conclusion, that I have but little to add. Careful perusal of the evidence satisfies me that John H. Benn never considered that he had entered into any agreement depriving himself of full control over his property. The only question, apart from that of the application of the Statute of Frauds, which would present itself to me, would be whether, consistently with the basic rules requiring in such cases the utmost clarity of proof, the evidence was sufficient to establish after his death and against his estate that John H. Benn had so spoken and acted as to entitle the plaintiff, his son, in July, 1921, to consider that a contract was in fact being entered into upon the faith of which he the son acted and changed his position.

Although the plaintiff alleged testamentary incapacity of his father in December, 1922, and undue influence, no real attempt to prove either was made, and that line of attack was abandoned by counsel.

In November, 1919, the plaintiff and his father each had property in his own right. One witness mentions \$45,000 as his recollection of what the father stated and therefore presumably considered his son was worth. The father's estate at his death was valued at about \$42,000—no debts are spoken of. There is no evidence that the wills which the father and son made on the 24th November, 1919, largely in each other's favour, were made in pursuance of a bargain. They were simply concurrent expressions of independent goodwill and intention. The father and son and the added defendant, the plaintiff's sister, were all living in separate towns. The sister does not seem to have been considered at any time. Her financial position does not appear. In the father's will of December, 1922, he states that the children are well provided for by their grandfather's will.

The Adelaide street property in Toronto, upon which this case centres, and in which the father had a one-fifth interest, was mortgaged for \$13,000, and was leased till November, 1921. The rents under this lease were insufficient to meet the outgoings, and a trust company, the trustee of the property, had advanced about \$4,800, making the total incumbrance about \$18,000. In June,

App. Div. 1921, the trust company, in asking J. H. Benn for a remittance of \$158.34, stated that it was expected that the rents would, after November, be increased to cover the outgoings. The only valuation of the property in the evidence is over \$70,000, which is said to be somewhat in excess of the assessed value. The plaintiff purchased the one-fifth share of his father for \$8,549.80, less the share of incumbrance. It thereafter bore its own burdens, and he was not called upon to pay out anything except the interest on the mortgage for \$4,500 to his father. In the father's letter to him of the 24th August, 1921, quoted by my Lord, he is reminded that he got the property at the very low figure he had offered.

It would then appear that the father was really conferring a benefit upon the son by its sale—while getting rid of the trouble of attending to it.

In addition, the memorandum to be signed by the plaintiff stating his assumption of the claims on the property adds, "my father renouncing to me his one-third share of the oil painting." What this painting was does not appear, but the will of the plaintiff's mother directed a specified oil painting to be sold, the proceeds to be divided equally among her husband and daughter and son up to \$20,000 each, and any excess over \$60,000 to go to the son.

For this alleged agreement by the father, depriving himself of control of about \$39,000 for the son's benefit, the son was giving practically no consideration. Yet, according to his own witness Mr. Campbell, the plaintiff said, "he would be just as pleased if there was nothing to it or if the old man would back out or something of that sort."

It is worthy of note that Mrs. Harvey, when asked what was done after the plaintiff had indicated to his father his refusal to sign the agreement for purchase, puts it in her own words thus: "Then he made some remarks, Mr. Benn senior, about he had his choice of signing that agreement or he would disinherit him or something of the kind, I could not tell you exactly but it amounted to the same thing. It was something about cutting off his inheritance and that he need not trouble to come and see him. That was about what I gathered from him." Left to herself that is all she stated. It is only when she was prompted by the further question, "Was there any alternative held out to him if he did sign the agreement?" that she added, "The alternative was that he would leave his will made in 1919 remain;" and, again prompted by the question, "You heard that yourself?" she again added, "I heard Mr. Benn say that until his death." That the

year of the will was mentioned or the words "until his death" used are alike improbable. Again, in Mrs. Hunter's evidence of the steamboat conversation, which she puts in 1922, though the words point rather to 1921, she makes the father say: "However I have got Wellesley to buy some Toronto property I had, and thus it will relieve me a good deal;" and further on to add: "Any-way I have made an agreement with Wellesley that everything I have practically goes to him when I go." Then she adds, "I won't say those were the exact words." Manifestly the change of one word substituting "and" for "that" would make all the difference.

Everything that is in writing bearing on the matter is against the plaintiff's contention and points to the non-existence of any such agreement as is alleged.

The deed makes no reference to it. The plaintiff's affidavit of the 20th July, 1921, under the Land Transfer Act, 1921, states the full and true price of the land at \$8,549.81.

The father's letters of the 2nd August, 1921, and the 24th August, 1921, to which my Lord has referred, are inconsistent with it—and his letter of the 1st October, 1921, to the plaintiff, said, "I am as economical as possible so that there will be as much for my heirs as possible." In his letter of the 25th February, 1922, he uses the words "my heir."

In the face of such letters, the silence of the executed documents, the practical absence of consideration for the alleged agreement, the plaintiff's implied assertion to Campbell that he was gaining no advantage from the transaction, the inconsistency of the agreement with the father's strong assertive character, it would be most unsafe for any court to give effect to evidence such as is here offered, after John H. Benn's death, to shew that he, an admittedly honourable man, had made an agreement which he deliberately broke.

I would allow the appeal and dismiss the action, and both with costs.

FERGUSON, J.A.:—The principles which should guide us in reaching a conclusion as to whether the alleged verbal collateral agreement set up by the plaintiff has been established are, I think, enunciated in the authorities cited in the opinion of my Lord the Chief Justice.

Applying these principles to a consideration of the evidence in the light of the situation and relationship of the parties, the attendant circumstances, and the conduct of both parties subsequent

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Magee, J.A.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Ferguson,
J.A.

to the making of the alleged contract, I am unable to agree with the learned trial Judge in the conclusion that the contract has been established.

I am also unable to reconcile the subsequent letters and conduct of the father (admittedly an honest, honourable, prudent old gentleman) with a belief that he had entered into an agreement with his son not to change his will. Nor can I reconcile the son's conduct and silence, in face of his father's letter and actions, with a knowledge and belief that his father had intended to contract as the son now says.

As I see it, our task is to ascertain and give effect to the real intention and understanding of the parties, for before there can be a contract the minds of the parties must be *ad idem*. The son has sworn to the use by the father of certain words in form at least sufficient to constitute an offer to contract and also to an acceptance, but before we give effect to such statements we should, I think, be sure not only that the father used these words, but that he intended thereby to enter into a binding contract and that his son so understood him and made the main contract on that understanding.

It is evident that the parties were not intending to contract in solemn form, else they would have reduced to writing this collateral contract, as they did the main contract, the making of which is put forward as the consideration for this much more important and far-reaching agreement.

I cannot rid myself of the idea that, had the son then believed that his father really and seriously intended legally to bind himself in the way he now says he thought he did, the son would, at that time or when he gave his solicitors instructions to prepare the documents necessary for the completion of the main contract, have seen to it that the important and far-reaching contract collateral to the main contract was reduced to writing, or he would have surely asked for such a writing or made claim to having such a contract on receipt (before the purchase provided for by the main contract was closed) of his father's letter clearly indicating that the father was then of opinion that he could change his will, but the son did none of these things—on the contrary, although his father lived for a considerable time and for part of that time on good terms with his son, the plaintiff never raised the question with his father.

I am satisfied that the father never knew and appreciated that his words were sufficient to bind him, and that he did not intend, by the use of such words, to contract, and I doubt that the son, at

the time of the conversation, believed that his father intended to contract. Friendly and confidential conversations between a father and son should not be given a legal and binding effect unless there is no doubt that both parties intended that their words should be, at the time, of legal and binding import.

For these and for the reasons stated by my Lord the Chief Justice, I would allow the appeal.

App. Div.

1925.

BENN

v.

HAW-
THORNE.

Ferguson,
J.A.

SMITH, J.A., agreed with MULOCK, C.J.O.

HODGINS, J.A.:—I agree with the judgment delivered in this case by Orde, J.A. All the questions argued before us are dealt with by him, and I concur fully in the reasons given by the learned Judge for his conclusions regarding them.

I only add this—the letter upon which the defendants rely as rendering the agreement proved so uncertain as to be unenforceable is expressed in this way: “If I should have occasion to change my will, which is the most unlikely thing conceivable, I will see that you lose nothing by your purchase, don’t be afraid of that.”

I regard this as most cogent corroboration of the terms of the earlier agreement as proved. The consideration for the son’s purchase of an onerous obligation was that the father’s will should remain unchanged. This consideration was to compensate him for any possible and probable loss in assuming the father’s position as owner of the one-fifth share in the Toronto property. The father was to be fully indemnified against liability, and this was inserted in the deed and assumed by the son and cannot now be undone.

The letter, while it recognises the father’s obligation, suggests something so vague and uncertain that it is quite impossible to attach any qualification to the original promise which would be capable of any reasonable expression.

Being itself uncertain, it cannot be enforced against the terms of the explicit agreement established. If it suggests anything, it is that no substantial alteration would be made which would infringe upon what had been agreed upon. The will not proved goes far beyond this, and plainly enlarges the only reservation suggested by the father.

The estate cannot reasonably assert the contrary, and the son should only be bound by its narrow extent, and so far as he is willing to assent to it. And he does not agree to the present will.

App. Div.

1925.

BENN

v.

HAW-
THORNE.Hodgins,
J.A.

I think the appeal should be dismissed; and, following *Re Fleck* (1924), 55 O.L.R. 441, in the Divisional Court, with costs.

Since writing the above, I have had the advantage of again considering this case in the light of the judgments of my Lord the Chief Justice and my brother Ferguson. The matters therein relied upon are, no doubt, of importance in a case of this kind; but are not exhaustive. I cannot avoid the conclusion that to reverse this judgment would go contrary to a very salutary rule often laid down, both in England and Canada, that "it must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge, who has seen and watched them, whereas the appellate Judge has had no such advantage." *Wood v. Haines* (P.C., 1917), 38 O.L.R. 583, 586; *Morrow Cereal Co. v. Ogilvie Flour Mills Co.* (1918), 57 Can. S.C.R. 403. This is specially important in a case where the peculiar relationship of father and son enters into every phase of the transaction, and where the contract was wholly executed by the latter in the lifetime of the parent.

Appeal allowed (HODGINS, J.A., *dissenting*).

[APPELLATE DIVISION.]

STONE v. KOHEN.

1925.

Sept. 25.

Judgment—Defendant not Appearing at Trial—Judgment for Plaintiffs by Default—Motion to Set aside—Rule 499—Delay in Moving—Discretion—Appeal.

Rule 499 provides that where a party does not appear at the trial the judgment may be set aside and a new trial ordered by a Judge:—

Held, that the granting or refusing of an order under that Rule is in the discretion of the Judge applied to, and the appellate Court should not interfere with his order, unless the Judge has failed to exercise his discretion, or has proceeded on a wrong principle, or on an erroneous view of the facts, or in exceptional circumstances. *Goulding v. Wharton Saltworks Co.* (1876), 1 Q.B.D. 374, and other cases, referred to.

Where the defendant did not give a satisfactory explanation of her failure to appear at the trial, and did not launch her motion to set aside the judgment by default until more than seven months after it came to her knowledge, the Court declined to interfere with the order of a Judge dismissing the motion.

APPEAL by the defendant from an order of LOGIE, J., dated the 24th June, 1924, refusing an application made by the defendant to set aside a default judgment pronounced at the trial on the 22nd January, 1922.

January 26. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, J.J.A.

The appellant appeared in person.

H. C. Draper, for the plaintiffs, respondents.

September 25. The judgment of the Court was read by FERGUSON, J.A.:—The defendant's application was made under Rule 499, which reads:—

“Where a party does not appear at the trial, the judgment may be set aside and a new trial ordered by the Judge presiding at the sittings, or by a Judge.”

I am of opinion that the granting or refusing of an order under Rule 499 must rest in the discretion of the Judge applied to, and that this Court should not interfere with his order: *Goulding v. Wharton Saltworks Co.* (1876), 1 Q.B.D. 374; *Watson v. Rodwell* (1876), 3 Ch. D. 380; *Sheffield v. Sheffield* (1875), L.R. 10 Ch. 206; *Mangan v. Metropolitan Electric Supply Co.*, [1891] 2 Ch. 551; *Maass v. Gas Light and Coke Co.*, [1911] 2 K.B. 543:

App. Div.

1925.

STONE

v.

KOHEN.

Ferguson,

J.A.

Ritter v. Godfrey, [1920] 2 K.B. 47; unless the Judge has failed to exercise his discretion: *Wilson v. Irwin* (1885), 10 P.R. 598; *Direct Photo Engraving Co. v. Martin*, [1921] 2 K.B. 187, 194; or has proceeded on a wrong principle: *Crowther v. Elgood* (1887), 34 Ch. D. 691; or on an erroneous view of the facts: *Kierson v. Joseph R. Thompson & Sons Ltd.*, [1913] 1 K.B. 587; or in exceptional circumstances: *In re Martin* (1882), 20 Ch. D. 365; *In re Wray* (1887), 36 Ch. D. 138. Lord Justice James, as far back as 1876, in *Golding v. Wharton Saltworks Co.* (*supra*), stated the principles which should guide the Court in determining the appeal, in these words:—

“The Court of Appeal in Chancery has laid down over and over again that, on a question which depends on the discretion of the Judge, the Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be overruled where serious injustice would result from that decision; but, as a general rule, the Court of Appeal declines to interfere.”

There is a great mass of material on the motion, which was not launched till more than seven months after the default judgment came to the applicant's knowledge, and not brought on for hearing until one year and eight months after being launched.

The action was commenced, early in 1917, for the price of goods shipped to the defendant in 1916, and for a receiver. On the 24th January, 1917, Mr. Justice Middleton made the following order:—

“1. This Court doth order that Frederick Curzon Clarkson be and he is hereby appointed, without security, to get in and receive all coal shipped by the plaintiffs to the defendant and remaining undelivered, and make delivery to such persons as said coal shall have been sold to by the defendant so far as coal sold by plaintiffs to the defendant will suffice, and also to get in and receive all moneys due and to become due for coal already sold by defendant and hereafter sold by the receiver by any persons, firms, or corporations to the defendant in respect of coal sold by the plaintiffs to the defendant, leave being reserved to the defendant to apply to discharge the receiver so soon as he has enough money in hand to protect the plaintiffs.

“2. And this Court doth further order that the sums in the hands of the receiver be from time to time paid by the said Clark-

son into Court to the credit of this action, subject to further order.

"3. And this Court doth further order that the parties do expedite the trial of this action; that the statement of claim be delivered on or before the 31st instant; statement of defence within five days thereafter; joinder within three days thereafter; and that the case may thereupon be at once entered for trial and placed on the trial list without waiting for the statutory three weeks; and either party may apply to the Judge assigned at the sittings to advance the case upon the list.

"4. And this Court doth further order that the costs of this motion and of the said Clarkson be reserved to the trial Judge and if not disposed of by him be costs in the cause."

The defendant appealed from an order of Riddell, J., and from the above order of Middleton, J., but the appeal was dismissed on the 6th March, 1917.

The record discloses that the plaintiffs delivered a statement of claim on the 31st January, 1917, but the defendant did not plead, and that the action was on the 18th May, 1918, entered for trial, on a record consisting of the plaintiffs' statement of claim and the defendant's affidavit of merits made on the 29th January, 1917. After frequent postponements of the trial, an order was made on the 11th January, 1922, directing that the action should be put on the peremptory list for trial on the 17th January, 1922. This was done, but the action was not called for hearing till the 24th, on which day, the defendant not appearing, the Chief Justice of the Common Pleas awarded the plaintiffs judgment for \$8,869.81.

Though the defendant knew of the judgment a few days after its pronouncement, she did not move for eight months, and in the meantime the plaintiffs applied for and received the moneys in the hands of the receiver and the Court. The learned Judge appealed from was of opinion that the defendant had not moved in time.

The plaintiffs assert that to require them now to gather up and produce the evidence and witnesses necessary to try this claim, arising out of transactions which took place more than nine years ago, or to meet the defendant's counterclaim for damages, would be putting them at a great disadvantage.

The defendant had a fair and reasonable opportunity to have a trial of the issues, and after she learned of the judgment did not move promptly or in accordance with the practice. I have gone

App. Div.

1925.

STONE

v.

KOHN.

Ferguson,
J.A.

App. Div.
1925.
STONE
v.
KOHEN.
Ferguson,
J.A.

over the material and am of opinion that the defendant has not given a satisfactory explanation of her failure to appear at the trial or move promptly, and I am impressed with the plaintiffs' assertion that they would be prejudiced by the delay. Therefore, I am unable to say that, in the circumstances disclosed in the material, the learned Judge did not exercise his discretion or did not exercise it judicially and reasonably or that he proceeded on a wrong principle or on an erroneous view of the facts.

I would dismiss the appeal with costs.

This judgment will not affect any counterclaim the defendant may have.

Appeal dismissed.

[APPELLATE DIVISION.]

1925.
Sept. 25.

SELLORS v. WOODRUFF.

Trade Union—Moneys Collected from Members of Branch—Trust-fund—Repudiation of Canadian Society and Branches by Parent Society in England—Benefits—Refusal to Pay—Whether Parent Society Entitled to Funds of Branch—Trade Unions Act, R.S.C. 1906, ch. 125, sec. 5.

The plaintiffs, being the officers and members of the Canadian executive board of a benefit society registered in England under the Trade Union Act, sued the defendants, as officers and trustees of a local branch of the society at the city of O., in Canada, for an account and for payment and delivery over to the plaintiffs of all sums of money and other assets come to the hands of the defendants as such officers and trustees. In July, 1923, at a general meeting of the society held in England, the connection with the Canadian branch was declared to be severed and all local branches in Canada cut off, the effect being that from the 1st January, 1924, the English society no longer held itself liable to contribute to the payment of benefits to Canadian members. The severance was concurred in by the Canadian branch and by the local branch at O. The action was brought after the severance had taken place, with the object of obtaining the funds which the members of the branch at O. had paid into the local treasury to secure for themselves the benefits provided for by the by-laws and rules of the parent society. The society was not registered under the Canadian Trade Unions Act. By the rules, the legal title to the funds contributed by members was vested in the English society, which was liable to each individual member for the benefits to which he might become entitled, but the custody of the local funds remained with the local branch and the funds were disbursed by it:—

Held, that, the society having repudiated its obligations under the rules, and the repudiation having been accepted by the local branch at O., the society could not insist upon the performance by the defendants of the obligations which the rules cast upon them.

Held, also, that the moneys and assets claimed constituted a trust-fund contributed by the local branch on a certain basis; and, that basis having been altered and destroyed, neither the English society nor the subsidiary Canadian society nor the individual plaintiffs had any status to claim the fund.

Amalgamated Society of Carpenters and Joiners v. Sinclair (1925), 56 O.L.R. 559, considered and distinguished.

Section 5 of the Trade Unions Act, R.S.C. 1906, ch. 125, referred to.

App. Div.

1925.

SELLORS

vs.

WOODRUFF.

APPEAL by the plaintiffs from the judgment of ROSE, J., at the trial at Ottawa (31st March, 1925), dismissing the action, which was brought against the defendants, as trustees, for an accounting and for payment and delivery over to the plaintiffs, or one or more of them, of all sums of money and other assets received by or come into the hands of the defendants as officers of the Ottawa branch of the Amalgamated Society of Carpenters and Joiners.

June 4. The appeal was heard by LATCHFORD, C.J., MIDDLETON and MASTEN, J.J.A., and WRIGHT, J.

L. P. Sherwood, for the appellants.

J. A. Grace, for the defendants, respondents.

September 25. MASTEN, J.A.:—Paragraph 1 of the statement of claim is as follows:—

“The plaintiffs are members of the Amalgamated Society of Woodworkers of Great Britain, a voluntary association, having its general office or headquarters at Manchester, in the county of Lancaster, England, and branches in England, Canada, and other parts of the world.”

In the Dominion of Canada the Amalgamated Society of Woodworkers is known as the Amalgamated Society of Carpenters and Joiners, and para. 3 of the claim describes the plaintiffs as all the officers and members of its Canadian executive board. Paragraph 4 of the statement of claim describes the defendants as being, at all times material to this action, members of the Amalgamated Society of Woodworkers of Great Britain, and alleges that they were on the 5th February, 1924, and for some time theretofore, officers and trustees of the local branch of the said society at the city of Ottawa.

Prior to 1921 the English society was known as the Amalgamated Society of Carpenters and Joiners, and had a branch in Canada operating under the same name. In 1921 a re-organisation of the English society took place, and its name was changed to “The Amalgamated Society of Woodworkers of Great Britain,”

App. Div.

1925.

SELLORS
v.

WOODRUFF.

Masten,
J.A.

but the Canadian branch continued to operate here under the name of the Amalgamated Society of Carpenters and Joiners, though still maintaining its relationship as a branch of the English society.

The English society is registered in England under the Imperial Trade Union Act, but no registration has been effected under the Canadian Trade Unions Act in either name.

The rules governing the Canadian branch and the rules governing the English branch, in so far as they relate to the matters in controversy in this action, are substantially identical.

They provide, among other things, for the establishment of local branches, the payment by Canadian members to the local branch of an ordinary contribution of 37 cents per week, for the making of levies by the local branch on its members for special purposes, for the making of a general levy by the head-office in England, and for the proper custody and banking of the funds collected. They also provide for the local disbursement of the funds so contributed. (See rule 21, clauses 15-23.)

Rule 9, clause 10, provides that "All moneys subscribed by the members shall be the property of the society generally and not of the branches to which the members respectively belong, and shall be held for and devoted to the payments of the benefits specified in these rules and carrying out the objects of the society. Any member or members, branch or branches, seceding from the society, shall forfeit all claim to the benefits under our rules, and to all moneys, books, and property, held by or on behalf of the society, either at the general or district offices or at any other place."

By rule 10, clause 10, it is provided that a member or members, who have been at least six months in this society, leaving his or their employment by the direction of the society, shall be entitled to the sum of £1 per week.

Rule 11 provides an allowance to members, known as "unemployment benefit," at the rate of 12 shillings per week for 10 weeks and 6 shillings per week for the second 10 weeks.

Rule 12 provides for compensation to members for lost tools.

Rule 13 provides for sickness benefit, varying according to the class of membership and the length of the illness.

Rule 14 provides for accident benefit, which, in case a member is rendered incapable for life of following his trade, is £50 if he has been twelve months a member, and £100 if he has three years' membership.

Rule 15 provides for certain superannuation benefits, and rule 16 for certain funeral benefits.

The Canadian rules are similar, only changing the figures into dollars instead of pounds.

I refer to these latter provisions for the purpose of shewing that the Canadian members of the organisation were entitled to substantial benefits, and for these benefits were entitled, if necessary, to claim on the general organisation at its head-office, pursuant to rule 9, clause 10, quoted above.

The effect of these and the other rules appears to be that, while the legal title to the funds contributed by members is vested in the English society, and while the general society is liable to the individual member for the benefits to which he may become entitled, yet the custody of the local funds remains with the local branch and the funds are disbursed by it. It may contribute assistance to the general society or to other branches, and it may receive assistance from the general society. Provision is also made for regular and special meetings of the members of each local branch; and, in short, the local branch system is an integral and essential part of the conduct of the organisation.

These were the conditions which obtained during the time when the fund and assets now in controversy were collected from the members of the local branch at Ottawa.

Such being the position of the organisation, in July, 1923, a general meeting was held at the head-office in England, at which it was declared that the American branches of the society had proved a financial burden, and the connection theretofore existing with the Canadian branch, known as the Amalgamated Society of Carpenters and Joiners, was severed, and all local branches in Canada were cut off, the effect being that from the 1st January, 1924, the English society no longer held itself liable to contribute in any way to the payment of the benefits mentioned above, and by this present action claims to recover and take away the fund which the members of the Ottawa branch had paid in to secure for themselves the benefits conferred by the rules.

It thus appears that the Amalgamated Society of Carpenters and Joiners was a subordinate branch of the English society of Woodworkers, that the funds in question are shewn to have been contributed for the purposes and on the basis of the by-laws, rules, and regulations existing at the time when such funds were contributed by individual members of the society, and that the scheme and basis upon which such funds were so contributed has been entirely swept away by the action of the parent society in assum-

App. Div.

1925.

SELLORS

v.

WOODRUFF.

Masten,
J.A.

App. Div. ing to cut off all connection with its local branches in Canada and
1925. repudiating all obligations to the members of such local branches.
SELLORS It further appears that this action on the part of the English soci-
v. ety was not objected to or contested by the Canadian branch, but
WOODRUFF. on the contrary was concurred in by the Canadian branch and by
Masten, the local branch of that society at Ottawa.
J.A.

Dealing with this point, the learned trial Judge says in the course of his judgment:—

“To my mind the case is very plain. The parent organisation or the organisation as a whole, the Amalgamated Society, has announced through its authorised spokesmen that the former members in Canada are no longer in the position which the rules purport to give them, and that their rights to the benefits which the rules purport to confer will not be recognised, and it seems to me that, taking that position, repudiating its obligations under the rules, the Amalgamated Society, no matter how represented, is not in a position to insist upon the performance by these defendants of the obligations which the rules cast upon them, and is not entitled to an account from them of the moneys in their hands. It may or may not be that the action which the spokesmen for the Amalgamated Society say had the effect of altering the relationship of the society as a whole and the overseas districts, was effective. It may be that an action by the overseas districts against the society as a whole would have resulted in a declaration that the purported alteration of the relationship had no effect to destroy rights previously existing; but no such action was taken; and, so far as the local body to which these defendants belong is concerned, that body chose to accept the repudiation of the contract which the Amalgamated Society or its spokesmen purported to make.”

The learned trial Judge holds that they had the right to accept such repudiation, and that the action fails. In that view I concur. The learned trial Judge bases his judgment on the view that the by-laws, rules, and constitution constituted a contract between the individual members and the English society, and that, the contract having been broken by the society, they are unable to claim the benefits of it—that is, that they cannot, while repudiating liability for the benefits due to members, retain the fund which was the price paid by the members for those benefits.

I think that that view is correct, but I should mention another aspect in which the matter presents itself to me. The fund and assets in question are unquestionably a trust-fund contributed by the members of this local branch on a certain basis and footing. By the action of the English society, the basis on which these

moneys were contributed has been altered and destroyed, and thus the substratum on which the fund was created is gone, and neither the English society, nor its subsidiary, the Canadian society, nor the individual plaintiffs have any status to claim the fund which was created on a basis which has now been abrogated by themselves. I express no opinion regarding the ownership or distribution of the funds, but content myself with saying that the plaintiffs in this case fail to prove any right on their part.

I should not part with the case without adverting to the judgment of the Appellate Division in the case of *Amalgamated Society of Carpenters and Joiners v. Sinclair* (1925), 56 O.L.R. 559. In that case the only grounds of appeal, as stated at p. 560 of the report, were:—

“(1) The plaintiff, while a legal entity and in that sense a capable litigant, cannot succeed by reason of its objects being illegal.

“(2) Even if the plaintiff can sue, the defendants are not the persons liable.

“There is nothing else in the case.”

I note, in the first place, that that case seems to have been decided on the assumption that the Amalgamated Society had been registered in Canada under the Trade Unions Act here, whereas it appears in the evidence in this case that no such registration was effected, and therefore the society, whose objects were declared illegal in England in the case of *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K.B. 506, is not entitled to the benefit of our Trade Unions Act, R.S.C. 1906, ch. 125, sec. 5, which provides as follows:—

“5. No Act in force in Canada providing for the constitution and incorporation of charitable, benevolent or provident institutions, shall include or apply to trade unions; and this Act shall not apply to any trade union not registered under this Act.”

But, apart from that question, I would distinguish that case from the present on the facts, because it does not appear to have been brought to the attention of the Court in that case that the plaintiff in that case was in truth and in fact a branch of the English society, and that, as I have already pointed out, the substratum and basis upon which this fund was gathered together had been abrogated by the joint action of these two organisations.

I would dismiss the appeal with costs.

MIDDLETON, J.A. and WRIGHT, J., agreed with MASTEN, J.A.

LATCHFORD, C.J., agreed in the result.

App. Div.

1925.

SELLORS

v.

WOODRUFF.

Masten,

J.A.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1925.

IMERSON V. NIPISSING CENTRAL RAILWAY CO.

Sept. 25.

Negligence—Dominion Railway Company—Electric Car Running on Company's own Strip of Land—Injury to Person Standing near Tracks at Stopping Place—Speed of Car—Weather Conditions and Circumstances—Evidence—Findings of Jury—Judge's Charge—Question whether Injured Person a Trespasser in Effect Passed upon—Necessity for New Trial Avoided—Judicature Act, sec. 28—Absence of Statutory Limitation of Rate of Speed—Common Law Obligation—Reasonable Care—Contributory Negligence—Apportionment of Damages—Contributory Negligence Act, 1924.

The plaintiff, standing near a stopping place upon the defendant company's electric railway, outside of the rails, was struck by a car of the defendant's, going around a curve and bulging outwards, and was injured. At the trial of an action for damages for his injury, the jury found that the defendant company was guilty of negligence, consisting in its car "travelling too fast under prevailing conditions," and that the plaintiff was guilty of contributory negligence in that "he was not careful enough as to the distance he stood from the railway track." The car did not stop at the stopping place; the night was dark, the temperature low, with a strong wind blowing, and a train was proceeding on another track side by side with the electric car, the effect of which was to create a thick whirl of smoke, steam, and snow, which prevented the motorman of the electric car from seeing the plaintiff until he was within 10 feet of him. The driver said that he had slowed down to about 12 miles an hour when approaching the stopping place; but there was evidence from which the jury were entitled to find that he was going at a much greater speed. The car was running on the defendant company's own land, and it was alleged that the plaintiff was trespassing thereon. He said that he was waiting for a car going in the opposite direction; but the defendant company maintained that he was in reality using its land as a footway to his destination:—

Held, that, although no question as to whether the plaintiff was a trespasser was left to the jury, the issue had been clearly presented in evidence, and the jury had in effect determined that he was not a trespasser; and, no exception having been taken to the Judge's charge and "no substantial wrong or miscarriage having occurred," sec. 28 of the Judicature Act applied, and a new trial ought not to be granted on this ground.

2. The defendant company, being a Dominion railway company, was not subject to any statutory limitation of speed in respect of a train or car running upon the company's own land; but that did not absolve it from its common law liability if it was negligent; and it still remained liable for negligence if, having regard to all the circumstances of the case, its employees omitted that reasonable degree of care which the law justly requires of those who in the exercise of their rights are using an instrument of danger.

Canadian Pacific Railway Co. v. Fleming (1893), 22 Can. S.C.R. 33, followed.

There was evidence upon which the jury could properly find that in the prevailing conditions the motorman was driving his car too fast,

and so there was absence of the reasonable degree of care specified; and the jury's finding could not be said to be perverse.

The jury having assessed damages and (in view of the finding of contributory negligence) made an apportionment under the Contributory Negligence Act, 1924, a judgment in favour of the plaintiff pursuant to the apportionment was affirmed.

1925.

IMERSON
v.
NIPISSING
CENTRAL
RAILWAY
Co.

AN appeal by the defendant company from the judgment of MOWAT, J., at the trial, upon the findings of the jury, on the 16th December, 1924, in favour of the plaintiff. The action was for alleged negligence resulting in injuries received by the plaintiff when struck by the defendant company's electric car. The jury found that the defendant company was guilty of negligence and that such negligence consisted in its car "travelling too fast under prevailing conditions;" and that the plaintiff was guilty of contributory negligence in that "he was not careful enough as to the distance he stood from the railway track." The jury assessed the plaintiff's damages at \$6,000, and apportioned the amount, giving the plaintiff a verdict for one-half; and the trial Judge directed judgment to be entered for the plaintiff for \$3,000.

June 1 and 2. The appeal was heard by LATCHFORD, C.J., MIDDLETON and MASTEN, JJ.A., and WRIGHT, J.

R. H. Parmenter, K.C., for the appellant company.

A. G. Slaght, K.C., for the plaintiff, respondent.

September 25. MASTEN, J.A.:—The defendant company appeals, first, on the ground that the plaintiff was trespassing on the tracks of the defendant at the time of the accident; second, on the ground that there was no evidence of negligence on the part of the defendant and that the finding of the jury to that effect is perverse; and, third, on the ground that the learned trial Judge erred in directing the jury that the defendant's motorman should have slowed down more than he did, when the evidence was that the defendant's car was travelling on its own private property and was not approaching a public highway crossing, there being no limitation on a Dominion railway company as to the speed at which trains are at liberty to travel on its own land.

The plaintiff is a resident of the town of Cobalt. The defendant is a railway company incorporated by the Dominion of Canada, and operates by electricity a railway connecting the towns of Cobalt and New Liskeard. At the point where the accident occurred, the defendant's line of tracks parallels the Temiskaming and Northern Railway, the two lines lying about 10 feet or less apart. The accident took place on the night of the 12th February,

App. Div. 1924, in the township of Bucké, at or near a stopping point on
1925. the defendant's line of railway, known as the Louisa street stop,
between the towns of Cobalt and Haileybury.

IMERSON
v.

NIPISSING
CENTRAL
RAILWAY
Co.

Masten, J.A. on the easterly side of the railway leads from Louisa street across
the railway property to a small levelled space at the side of the
defendant's line, which constitutes the Louisa street stop, and
another pathway leads in from the westerly side. At the point
where the accident took place, the railway track runs on a curve
of 4°. The effect of this curve is that the pilot of the defendant's
car (which normally overhangs the rail by 6 inches) extends 12
inches as the train goes around the curve, so that a person stand-
ing 11 inches outside the rail would be struck by the car.

The night was dark; the temperature 5° below zero; a strong
wind was blowing from the south; and at the time when the acci-
dent occurred a freight train was proceeding north, side by side
with the electric car. The effect of this combination of circum-
stances was to create a thick whirl of smoke, steam and snow,
which prevented the motorman of the electric car from observing
the plaintiff till he was within 10 feet of him and an accident
was inevitable. The driver says that the plaintiff was standing
still, facing towards the north.

Notwithstanding that his vision was obscured, the driver of
the electric car knew when he was approaching the Louisa street
stop. At p. 46, line 24, of the transcript of evidence, he says:—

“Q. How fast was your street car travelling as you approached
what is known as Louisa street stop? A. When I approached the
stop I would slow down and would go 12 miles an hour or slightly
under.

“Q. Why were you slowing down? A. On account of the
freight train steaming up and the speed it was going and the smoke
or steam coming down from the steam train obstructing my view,
and I was near the stop and slowing down for precaution in case
I would see somebody.”

But there was evidence from which the jury were entitled to
find that he was going at a much greater speed.

The plaintiff had been spending the evening with friends near
this stop, and was proposing to return to his home at the town of
Cobalt. With that intention he entered upon the defendant's

line of railway at or near the Louisa street stop. At this point a difference arises between the contentions of the plaintiff and the contentions of the defendant. The plaintiff alleges that he came to the place where the accident occurred with the design of boarding the defendant's train going towards Cobalt and in ignorance of the fact that the last train going toward Cobalt had already passed Louisa street. The defendant, on the other hand, contends that before leaving his friend's house the plaintiff was well aware that the last train had gone south to Cobalt and that he in fact entered upon the defendant's line of track as a trespasser, using it as a pathway by which to walk to Cobalt.

App. Div.

1925.

IMERSON
v.NIPissing
CENTRAL
RAILWAY
Co.

Masten, J. A.

The evidence all indicates to me that at the time when the accident occurred the plaintiff was standing beside the railway track and was not walking along it. He appears to have been looking to the north for the car which he desired to take and which would be coming from the north and going south to Cobalt. While in that position, and while standing too close to the railway, he was struck by the defendant's train proceeding north from Cobalt toward Haileybury.

I deal first with the appellant's contention that the plaintiff was a trespasser as set forth in grounds of appeal numbered 4, 5, and 6, which are as follows:—

“4. The plaintiff was trespassing on the tracks of the defendant at the time of the accident, and there was therefore no duty on the defendant to take greater precautions than were taken. In the circumstances the learned Judge should have withdrawn the case from the jury and dismissed the action.

“5. The learned Judge erred in not finding on the evidence that the plaintiff was a trespasser or in not submitting a question to the jury on this point as requested by counsel for the defendant.

“6. The learned trial Judge misdirected the jury on the point as to whether the plaintiff was or was not a trespasser.”

In his charge the learned trial Judge deals with the question as follows:—

“The railway claims the only place to go is on the little plateau, and they think it would be trespass for these three persons to be even at the pole which had a lamp on it, or, as they say, 22 feet to the south of that. It is for you to say, and Mr. Gordon, counsel for the defence, asked me to submit a question to you, but I do not think it is necessary. Take it into consideration in the general question of negligence, and if it was trespass for these

App. Div. people to be there that is a very great element in what conclusion
1925. you should come to, but if there is an invitation and this path
IMERSON had been used and these people knew it and there was an entrance,
v. I think it will be hard to say there was a trespass."

NIPISSING Undoubtedly it would have conduced to a trial more satisfac-
CENTRAL tory to the parties and less troublesome to this Court if the learned
RAILWAY trial Judge had seen fit to submit to the jury a question as to
Co. whether the plaintiff was at the time of the accident a trespasser.
Masten, J. A. In the alternative, if he did not submit such a question, he ought
to have instructed the jury regarding the law of trespasser and
the law of invitee as it applies to the circumstances detailed in
evidence. This he did not do, but no exception to his charge was
taken on this ground.

However, after a careful perusal of the pleadings, the evidence, the whole of the Judge's charge, and the findings of the jury, I think that the jury have in effect determined that the plaintiff was not a trespasser. The issue of fact was plain and simple and had been clearly presented in evidence and, I doubt not, in the addresses of counsel.

The plaintiff and his witnesses claimed that they were invitees who entered by the customary pathway and were standing at the usual place for embarking, waiting for the car to Cobalt. The defendant gave evidence that the plaintiff and his companions knew before entering the defendant's property that they had missed the last car and that they had stated to several persons that the party (including the plaintiff) were walking to Cobalt on the defendant's "right of way." Thus the issue of fact was simply and plainly presented to the jury and they could not have misapprehended it. The question could not have been withdrawn from the jury, and it was definitely left to them though without adequate legal instruction. But no exception was taken to the charge, and the jury in their answers have made no reference to it, and must, I think, be taken to have held against the defendant's contention that the plaintiff was a trespasser. For this Court to hold that the defendant owed no duty to this plaintiff because he was a trespasser would be to negative the finding of the jury that the defendant was guilty of negligence.

Upon a consideration of all the evidence and particularly the evidence of the defendant's witness, the motorman Lemieux, I am satisfied if I were trying the case without a jury I would be bound to hold that the plaintiff was not a trespasser.

My conclusion therefore is that, notwithstanding the unsatisfactory manner in which this question was left to the jury, it has in reality been properly determined by them; and that, no exception having been taken to the charge and "no substantial wrong or miscarriage having occurred," the provisions of sec. 28* of the Ontario Judicature Act apply, and a new trial ought not to be granted on this ground.

The second and third grounds of appeal may conveniently be considered together. They are: that there was no evidence of negligence on the part of the defendant, that the jury's finding to the contrary is perverse, and that the Judge erred in directing the jury that the defendant's motorman should have slowed down more than he did—such direction being erroneous because the defendant company is a Dominion railway company, and there is nothing to prevent it from going as fast as it likes on its own land.

In Ontario it is now well settled that, apart from statutory provisions or regulations by the Railway Commissioners, which apply only in the circumstances specified in such statutes or regulations, a Dominion railway company running on its own property is not limited to any specified speed: *Grand Trunk Railway Co. v. McKay* (1903), 34 Can. S.C.R. 81; *Gowland v. Hamilton Grimsby and Beamsville Electric Railway Co.* (1915), 33 O.L.R. 372.

Under the circumstances detailed in evidence, there was in this case no breach of any statutory obligation or regulation such as existed in *Grand Trunk Railway Co. v. Hainer* (1905), 36 Can. S.C.R. 180, or in *Misener v. Wabash Railway Co.* (1906), 12 O.L.R. 71.

But the absence of any statutory limitation of speed does not absolve the defendant from its common law liability if it is negligent, and it still remains liable for negligence if, "having regard to all the circumstances of the case its employees omit that reasonable degree of care which the law justly requires of those who in the exercise of their rights are using an instrument of danger:" *per King, J.*, in *Fleming v. Canadian Pacific Railway Co.* (1892), 31 N.B.R. 318, at p. 345, adopted by the Supreme Court of Canada on appeal: *Canadian Pacific Railway Co. v. Fleming* (1893), 22 Can. S.C.R. 33. See also the observations of Clarke, J.A., in

App. Div.

1925.

IMERSON
v.NIPISSING
CENTRAL
RAILWAY
Co.

Masten, J.A.

*28.—(1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not upon a question which the Judge at the trial was not asked to leave to the jury, unless some substantial wrong or miscarriage has been thereby occasioned.

App. Div. *McCaffry v. Canadian Pacific Railway Co.*, [1924] 2 D.L.R. 213,
1925. and of Duff, J., in *Napierville Junction Railway Co. v. Dubois*,
[1924] S.C.R. 375, at p. 380.

IMERSON
v.
NIPISSING
CENTRAL
RAILWAY
Co.
Masten, J.A. Whether, under the circumstances of this case, the railway company was guilty of any default in the fulfilment of the duty owing to the plaintiff at common law was a question of fact for the jury; and, if there is any evidence on which the jury could honestly find that the defendant company was guilty of the negligence found—driving its car too fast under the conditions then prevailing—this Court cannot interfere.

Now what duty did the defendant company owe to this plaintiff? It has been suggested that it was the duty of those in charge of the car to halt at the Louisa street stop if any passengers were there waiting to go north; and, while it is true that the plaintiff was not going north, but south to Cobalt, yet the driver of the car did not know that fact and ought to have stopped his car to enable the plaintiff to board it in case he wished to go north. If he had stopped his car, the accident would not have happened. Hence it is said his non-observance of that duty contributed to the accident.

As the motorman could not, owing to darkness and the whirl of snow, steam and smoke, coming from the freight train, observe whether or not any person was waiting at the Louisa street stop, he might well, as a reasonably prudent man, have brought his car to a halt to enable him to ascertain the fact. But I see great difficulty in the way of giving effect to this as the foundation of legal liability.

There is no statutory obligation compelling a Dominion railway company's train to stop at every station on its line. Its only obligation is the implied obligation to convey passengers who properly present themselves for transportation relying on the time-tables and practice of the railway company.

In the present case, the plaintiff was not going north, and the officers in charge of the electric car owed no duty to stop for him: but, even if he had been going north and the car had failed to stop, what right of action would arise from that failure? Surely nothing except such damages as the plaintiff suffered from not being picked up. In this aspect the failure to stop does not form the basis of a claim for negligence, but rather of a claim for breach of an implied obligation to stop and convey the passenger who presents himself for transportation, relying on the time-tables of the railway company.

The real point narrows, I think, to this: Was there evidence on which the jury could properly find that in the prevailing conditions the motorman was driving his car too fast, and so there was an absence of that reasonable care which under the circumstances the common law demands?

Bearing in mind the fact that Louisa street was a regular stopping place on the line and that the motorman knew he was approaching it; that passengers might have been coming into it from the east or crossing to it from the west over the electric line; that such passengers might, in the darkness and storm, inadvertently stand on the line or approach too near it (as the plaintiff actually did); and bearing in mind also the lack of visibility owing to the darkness, the proximity of the freight train with the smoke and steam, and the prevailing weather conditions, the situation was very like that of a ship in a fog. Do not these circumstances justify the view of the jury that a reasonably prudent and careful motorman would have proceeded "dead slow" and with his car under complete control when passing the Louisa street stop? The evidence warranted the view that, instead of adopting this course, the electric car was proceeding not at 12 miles per hour, as sworn by the motorman, but at a very much higher speed, and recklessly. I am unable to say that the finding of the jury is perverse or that there is no evidence to support it—in fact it commends itself to me as indicating the real cause of the accident. The motorman ought reasonably to have anticipated the danger of the very thing that happened. The trial Judge did not exceed his province in his remarks to the jury on these matters.

The appeal must be dismissed with costs.

MIDDLETON, J.A., and WRIGHT, J., agreed with MASTEN, J.A.

LATCHFORD, C.J.:—From the evidence of Lemieux, the defendant's motorman, as well as from the evidence of Imerson and his companions, it is plain that the party were not, as the defendant alleges, walking along the grade towards Cobalt, but were standing looking northward at the end of the path near the unlighted lamp, where the snow had been trampled by persons who in winter ordinarily stood there, and not at the bench on which they could not then sit, awaiting a car.

The jury's finding, that, in the conditions prevailing at the time which obscured the motorman's vision of the "stop" and of

App. Div.

1925.

IMERSON
v.
NIPISSING
CENTRAL
RAILWAY
Co.

Masten, J.A.

App. Div.

1925.

IMERSON
v.NIPISSING
CENTRAL
RAILWAY
Co.Latchford,
C.J.

persons who might there be waiting, the car was travelling at an excessive speed, is amply warranted. The defendant was clearly negligent in that respect.

The plaintiff has been found to have contributed to the accident by standing too close to the rails, but that does not now completely exonerate the defendant from liability. The jury has apportioned the damage under the Contributory Negligence Act, 1924, according to what they thought were the respective degrees of fault of the parties, and their decision on the point is not in question.

In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

[WRIGHT, J.]

DEACON v. CREHAN.

1925.

Sept. 26.

Master and Servant—Employment of Physician as Assistant—Wrongful Dismissal—Alleged Injury to Patient—Failure to Shew Negligence or Want of Skill—Condonation—Contract—General Hiring—Dismissal without Notice—Reasonable Notice—Failure to Prove Damage—Nominal Damages—Covenant of Assistant not to Engage in Practice in Defined Area for Period after Termination of Contract—Reasonableness and Validity—Covenant not Enforceable—Repudiation by Wrongful Dismissal—Provision for Liquidated Damages—Injunction—Election.

The plaintiff, a physician, employed the defendant, also a physician, as his assistant, upon the terms of a written agreement, whereby the defendant agreed to serve the plaintiff as a physician in his practice in the city of S., and in consideration of the defendant's services the plaintiff was to pay him at the rate of \$250 per month, beginning on the 1st January, 1923, and continuing until the 15th October, 1923, and thereafter as then arranged. The defendant covenanted that he would not carry on or take part in the practice of medicine within a radius of ten miles of the city of S. for five years from the termination of the contract, and in case of any breach of the covenant would pay the plaintiff \$500 as liquidated damages and not as a penalty. No arrangement was made in October, 1923, but the plaintiff paid the defendant \$250 a month until the 30th April, 1925, and the defendant continued in the employment of the plaintiff until the 4th May, 1925, when the plaintiff dismissed him without notice. A patient of the plaintiff, in June, 1924, complained that he had been injured in the course of treatment administered by the defendant. The plaintiff, in April, 1925, made a settlement with this patient, paying him a sum of money, and then demanded that the defendant should reimburse him a part of what he had paid. Upon the defendant refusing to do so, the dismissal followed:—

Held, that there was no sufficient proof of malpractice or want of skill on the part of the defendant in his treatment of the patient and no sufficient ground for his dismissal; if there was any negligence or lack of skill, it was condoned by the plaintiff retaining the defendant in his employment after knowledge of the complaint; and the dismissal was wrongful.

The contract amounted to a general hiring of the defendant, and the plaintiff was bound to give the defendant reasonable notice of its termination: in the circumstances, one month's notice would be reasonable.

Harnwell v. Parry Sound Lumber Co. (1897), 24 A.R. 110, applied and followed.

The restraint imposed by the covenant was reasonable and justified by the circumstances of the case: the area was not too wide, for the plaintiff's practice extended in all directions in the country around the city of S. to at least ten miles.

Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A.C. 535, followed.

If the object of the covenant was solely to prevent competition it would be void; but the defendant, in the course of his duties as the plaintiff's assistant, having become acquainted with the latter's patients and had an opportunity to establish himself in their confidence, was in a different position from an ordinary competitor.

Herbert Morris Ltd. v. Saxelby, [1916] 1 A.C. 688, distinguished.

1925.
DEACON
v.
CREHAN.

The agreement was reasonable and valid, but was not enforceable by the plaintiff, as by his action in wrongfully dismissing the defendant he repudiated the agreement on his part, and therefore could not insist upon the performance by the defendant of the covenant on the latter's part; and in this regard it made no difference that there was no stipulation as to notice and the only notice to be given was the reasonable notice required by law.

General Billposting Co. Ltd. v. Atkinson, [1909] A.C. 118, and *Measures Brothers Ltd. v. Measures*, [1910] 1 Ch. 336, [1910] 2 Ch. 248, applied and followed.

Semble, that the plaintiff, if entitled to succeed in the action, would have a right to an injunction restraining the defendant from practising. Although there was a provision for the payment of a sum as liquidated damages, the plaintiff had the right to elect which remedy he would pursue.

Hamilton v. Lethbridge (1912), 14 C.L.R. (Australia) 236, specially referred to.

The defendant was entitled to damages for wrongful dismissal, but only nominal damages, no evidence of actual damage having been adduced.

ACTION for an injunction restraining the defendant from carrying on the practice of medicine in the city of Stratford, or within a radius of ten miles thereof, for a period of five years, or in the alternative for damages for breach of a covenant contained in an agreement referred to below. The defendant counterclaimed for damages for wrongful dismissal.

The action and counterclaim were tried by WRIGHT, J., without a jury, at Stratford.

J. C. Makins, K.C., for the plaintiff.

J. J. Murray, for the defendant.

September 26. WRIGHT, J.:—The plaintiff and defendant are both physicians. Some time in 1922 the plaintiff employed the defendant as his assistant under a verbal contract, and on the 11th January, 1923, a written agreement was entered into between the parties whereby the defendant agreed to serve the plaintiff as a physician in his practice in the city of Stratford, and in consideration of such services the plaintiff was to pay the defendant at the rate of \$250 per month beginning on the 1st January, 1923. The provision of the agreement as to its duration is as follows:—

“It being definitely understood that this arrangement is until the 15th October, 1923, and thereafter as then arranged.”

It also contained the following covenant on the part of the defendant:—

“That he will not either directly or indirectly, either upon his own behalf or as assistant to any other physician, carry on or be engaged or concerned in or take part in the practice of medicine

within a radius of ten miles of the Corporation of the City of Stratford for a period of five years from the termination of this contract, and in case of any breach of this covenant he shall pay to the party of the first part" (i.e., the plaintiff) "the sum of \$500, to be recoverable as liquidated damages and not as a penalty."

Wright, J.
1925.
DEACON
v.
CREHAN.

The defendant continued in the employment of the plaintiff until the 4th May, 1925, when the latter discharged him.

No arrangement was made in October, 1923, as contemplated by the written agreement, but the plaintiff paid the defendant the salary stipulated therein, namely, \$250, until the 30th April, 1925.

The defendant had charge of the X-ray machine owned by the plaintiff and used in his practice. A patient named Lorne Hoffmeyer, who was receiving treatment under the direction of the defendant, complained that he had been injured in the treatment and in April, 1925, made a claim upon the plaintiff for compensation. After some negotiations, a settlement was made. The plaintiff demanded that the defendant should pay one-fourth of the amount of the settlement, but the defendant refused to do so. Thereupon the plaintiff discharged him.

There was no sufficient proof that the defendant was guilty of malpractice or unskilful treatment in connection with the treatment of Hoffmeyer, and there was not, in my opinion, any sufficient ground for his discharge by the plaintiff. In addition to that, the plaintiff knew of the treatment and the alleged injury to the patient Hoffmeyer in or about June, 1924, but with that knowledge he continued the defendant in his employ until May, 1925, as already stated.

In my view, this amounted to a condonation of any lack of skill or negligence on the part of the defendant, and the plaintiff could not, in May, 1925, set up this as a reason for discharge. See Smith's Law of Master and Servant, 7th ed., p. 74, and cases there cited.

In any event I hold that there was not sufficient proof of negligence or want of skill on the part of the defendant to justify his dismissal, so that for the purposes of this judgment I shall hold that the dismissal was wrongful.

The contract between the parties amounted to a general hiring of the defendant, as held in the case of *Harnwell v. Parry Sound Lumber Co.* (1897), 24 A.R. 110. Applying the principle of the decision in that case, the plaintiff was bound to give the defendant reasonable notice of its termination. In this case the only notice

Wright, J. given was on the 4th May, 1925, terminating the contract at once. It could not be contended that this was reasonable notice. What was reasonable notice under the circumstances of the case it is difficult to say. The defendant was employed at a monthly salary, and I think it would be reasonable to hold that he should get at least one month's notice under all the circumstances.

1925
DEACON
v.
CREHAN.

Several defences were set up, among them the following:—

(1) That the agreement between the parties was void as being in restraint of trade and unreasonable and contrary to public policy. This defence was allowed to be set up by way of amendment at the trial.

(2) By his wrongful dismissal of the defendant the plaintiff is disentitled to enforce the covenant contained in the agreement already cited.

(3) That in any event the plaintiff is not entitled to an injunction but only to the sum of \$500 stated in the agreement as liquidated damages for the breach of the same.

The defendant also counterclaimed for damages for wrongful dismissal.

As to the validity of the agreement, I think the terms of the same bring it well within the principles laid down in the leading case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535, where it is held that the proper test to be applied is, whether or not the restraint is justified by the special circumstances of the particular case, and that it is only justifiable where the restriction is reasonable—reasonable in reference to the interests of the parties concerned and reasonable in reference to the interests of the public; so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. See the judgment of Lord Macnaghten, at p. 565.

It was also argued that the restrictive covenant was too wide in its terms regarding the area covered by it, but I think this contention must fail, as it was proven by the plaintiff that his practice extended in all directions in the country around the city of Stratford to at least ten miles.

Counsel for the defendant relied on the decision in *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688, as authority for the proposition that in cases of employer and employee all such covenants as that in this case were void. A perusal of that case will shew that the point decided there was that if the object of the covenant was solely to prevent competition it would be void.

This is an entirely different case. The defendant, in the

course of his duties as the plaintiff's assistant, became acquainted with the latter's patients and had an opportunity to establish himself in their confidence. When he left the plaintiff's employment, he carried with him something he would not possess but for such employment. He is in quite a different position from any ordinary competitor or practitioner commencing practice relying on his own skill and personality.

I think therefore that the agreement was quite reasonable and is valid.

Referring now to the defence that the agreement is not enforceable by the plaintiff, as by his action in wrongfully dismissing the defendant he repudiated the agreement on his part, and therefore cannot insist on the performance by the defendant of the covenants on the latter's part: counsel for the defendant relies in support of this proposition on the decision of the House of Lords in *General Billposting Co. Ltd. v. Atkinson*, [1909] A.C. 118. In that case the employers agreed with their employee that he should hold office subject to termination on twelve months' notice by either party, and with a restriction on his part as to trade after its termination. The employers wrongfully dismissed him without notice. It was held that the employee was entitled to treat the dismissal as a repudiation of the contract and to sue the employers for breach of contract and was no longer bound by the covenant in restraint of trade.

At first I thought that possibly the present case could be distinguished from that case. In the case cited the contract contained a distinct term as to the notice to be given by the employers, whereas in the present case there is no such stipulation, and the only notice to be given is a reasonable notice implied by law.

Counsel also referred to *Measures Brothers Ltd. v. Measures*, [1910] 1 Ch. 336, affirmed on appeal in [1910] 2 Ch. 248. In that case there was a covenant on the part of the employee that he would not carry on business in competition with the plaintiff company. A winding-up order was made, and the service of the employee was thereby dispensed with. It was held that the winding-up order operated as a wrongful dismissal of the defendant, and that, applying the principle of *General Billposting Co. Ltd. v. Atkinson*, he was no longer bound by his restrictive covenant.

I think the decision in *Measures Brothers Ltd. v. Measures* applies to the present case, and that it matters not whether the contract itself provides for notice or whether it is implied by the law. If the employer wrongfully dismisses the employee he

Wright, J.

1925.

DEACON
v.
CREHAN.

Wright, J. cannot enforce a covenant in restraint of trade as against the employee.

1925.

DEACON
v.
CREHAN.

In this view, the plaintiff's action must fail, both in respect of his claim for an injunction and that for damages. See particularly *Measures Brothers Ltd. v. Measures*, [1910] 2 Ch. 248, at p. 262.

Dealing with the defence that the plaintiff would not in any case be entitled to an injunction, but would be driven to his remedy for damages, on the ground that this was agreed upon by the parties in the written contract, I think that, but for the fact that the defendant was wrongfully dismissed by the plaintiff, the latter would be entitled to an injunction notwithstanding the stipulation in the written agreement as to payment of liquidated damages upon a breach of the same by the defendant.

There is an absolute covenant on the part of the defendant that he would not practise in Stratford or within ten miles thereof for a period of five years after the termination of the contract; and, although there is a provision for the payment of the sum of \$500 as liquidated damages, yet the plaintiff has the right to elect which remedy he will pursue: *Toronto Dairy Co. v. Gowans* (1879), 26 Gr. 290; *General Accident Assurance Corporation v. Noel*, [1902] 1 K. B. 377; also *Hamilton v. Lethbridge* (1912), 14 C.L.R. (Australia) 236. This last case is directly in point and is most helpful in a consideration of the issues involved in the present case.

I have already held that the defendant was wrongfully dismissed, or rather dismissed without proper notice, and he will therefore be entitled to damages.

No evidence was given by the defendant as to the amount of these damages. It was apparently assumed by his counsel that he should be paid his salary for at least two months, but that does not necessarily follow. It is incumbent upon the party who sues for wrongful dismissal to prove damages. Of course if there is a breach of contract he is entitled, on shewing that breach, to nominal damages, but if he claims actual damages he must prove the same.

In this case there was no evidence given as to the damage. The defendant immediately commenced the practice of his profession in Stratford, and it might well be that his practice was more remunerative than his former position with the plaintiff. No evidence was adduced that he made any endeavour to procure another position so as to minimise his damages as much as possible. Therefore, upon the evidence I have no material upon

which to found a judgment for any damages other than nominal damages. See Mayne on Damages, 9th ed., p. 257, and cases there cited. The defendant is, of course, entitled to the sum of \$32.88, being his salary for the first four days of May, 1925. This is the amount of the cheque which the plaintiff tendered him but which he refused to accept.

The plaintiff's action will be dismissed, and the defendant allowed, on his counterclaim, nominal damages, say \$10, and his salary, \$32.88, in all \$42.88.

I do not think it is a case to allow costs.

Wright, J.

1925.

DEACON
v.
CREHAN.

[APPELLATE DIVISION.]

BEACH v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO.

1925.

Oct. 2.

Arbitration and Award—Price to be Paid for Electric Power Supplied—Submission to Arbitration—Power Commission—Statutory Corporation—Ultra Vires—Award—Nullity—Ex post Facto Consent of Attorney-General—Power Commission Act, R.S.O. 1914, ch. 39, sec. 16—Action to Enforce Award—Motion to Set it aside.

The judgment of WRIGHT, J., 56 O.L.R. 35, was affirmed.

Held, that the submission to arbitration was *ultra vires* of the defendants, a statutory corporation (aptly if inaccurately called "a Government department"); and the award made pursuant thereto was a nullity *ab initio*.

Bath's Case (1878), 8 Ch. D. 334, distinguished.

Held, also, that the award could not be given life by the consent of the Attorney-General given *ex post facto*, in alleged pursuance of the provisions of the Power Commission Act, R.S.O. 1914, ch. 39, sec. 16. And the defendants, with their strictly limited powers, could not have the right to assent to proceedings that might result in increasing the amount for which they would become liable.

Semble, if the submission were valid and the arbitrator could make a valid award, the award which he made, being based upon a wrong principle, could not stand.

AN appeal by the plaintiffs from the judgment of WRIGHT, J., 56 O.L.R. 35.

September 14 and 15. The appeal was heard by LATCHFORD, C. J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

J. M. Godfrey, K.C., and C. W. R. Mulloy, for the appellants, argued that the award should not have been set aside; that the arbitrator was right in proceeding upon a cost-plus basis; and that his findings were correct. They referred to *Toronto City Corporation v. Toronto Railway Corporation*, [1925] A.C. 177; *Attorney-General for Manitoba v. Kelly*, [1922] 1 A.C. 268.

App. Div.
 1925.
 BEACH
 v.
 HYDRO-
 ELECTRIC
 POWER COM-
 MISSION OF
 ONTARIO.

Sir William Hearst, K.C., and *W. N. Tilley*, K.C., for the defendants, respondents, contended that there were errors on the face of the award, and that the arbitrator, having taken into consideration things which he ought not to have so taken, was guilty of legal misconduct. The respondents alleged bias on the part of the arbitrator, and the mere allegation is sufficient reason to deter the Court from referring the matter back to the same arbitrator. The arbitration had proved abortive and the action to enforce the award could now be proceeded with. The arbitrator was *functus* as soon as he had published his award. The respondents had no power to make an agreement of submission to arbitration, since they had not been authorised to do so by the Lieutenant-Governor in Council, as required by sec. 8 of the Power Commission Act, R.S.O. 1914, ch. 39. The respondents were not a common law corporation; they had only the powers conferred upon them by statute. The parties could not by agreement exclude the provisions of the Arbitration Act, R.S.O. 1914, ch. 65. Reference to *Cameron v. Cuddy*, [1914] A.C. 651; *Czarnikow v. Roth Schmidt & Co.*, [1922] 2 K.B. 478; *Swift & Co. v. Board of Trade*, [1925] A.C. 520; *Great Central Railway Co. v. Banbury Union*, [1909] A.C. 78; *Melbourne Tramway and Omnibus Co. v. Tramway Board*, [1919] A.C. 667; *Attorney-General for Manitoba v. Kelly*, [1922] 1 A. C. 268; *Mills v. Boyers Society* (1856), 3 K. & J. 66; *In re Stringer and Riley Bros.*, [1901] 1 K.B. 105; *Electrical Development Co. of Ontario v. Attorney-General for Ontario*, [1919] A.C. 687; and *Halsbury's Laws of England*, vol. 1, paras. 995, 996.

Godfrey, K.C., in reply, contended that, regardless of the reasoning of the arbitrator, if his conclusions were right there was no error on the face of the award. The award does not shew a mistake of fact or of law, and, even if it does, it ought to be referred back to the arbitrator. He argued that the respondents, being a body corporate, had all the powers of a body corporate unless expressly limited by statute, and cited *Brice on Ultra Vires*, p. 170; *Bath's Case* (1878), 8 Ch. D. 334; *Irwin v. Campbell* (1915), 51 Can. S.C.R. 358.

October 2. The judgment of the Court was read by *RIDDELL*, J.A.:—The arguments, long and learned, in this case, have taken a very wide range; but, in the view I have formed, the appeal can be disposed of on simple grounds.

In this view, the important facts are few: the plaintiffs were producers of electricity (I use non-technical language), the defendants, the Hydro-Electric Power Commission of Ontario, pur-

chased from them some of the electricity, and no price was agreed upon, although negotiations were had in the matter. The defendants were from time to time billed at \$16 per horse power, the defendants paid \$12 without admitting further liability, nor on the other hand was there an admission of the sufficiency of the payments. Negotiations to settle the price failed, and the plaintiffs determined to enforce the claim by action. Faced with the provisions of the Power Commission Act, R.S.O. 1914, ch. 39, sec. 16, which reads, "Without the consent of the Attorney-General no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office," they applied to the Attorney-General for his consent; and, on the 30th January, 1922, a consent in writing was given, reading as follows:—

App. Div.

1925.

BEACH
v.HYDRO-
ELECTRIC
POWER COM-
MISSION OF
ONTARIO.

Riddell, J.A.

"In the Supreme Court of Ontario.

"In the matter of a proposed action between Mahlon Wickway Beach, Benson Clothier Beach, and Charles Asa Beach, the estate of Mahlon Ford Beach, plaintiffs, v. The Hydro-Electric Power Commission of Ontario, defendant.

"Pursuant to the provisions of the Revised Statutes of Ontario, chapter 39, section 16, I hereby consent to Mahlon Wickway Beach, Benson Clothier Beach, and Charles Asa Beach, executors of the estate of M. F. Beach, of the village of Iroquois, in the county of Dundas, bringing an action against the Hydro-Electric Power Commission to recover the sum of \$8,190.78, being the balance alleged to be due said estate for electric power supplied by said estate to the Hydro-Electric Power Commission of Ontario.

"W. E. Raney, Attorney-General.

"Toronto, 30th January, 1922."

Thereupon, on the 18th February, 1922, the plaintiffs commenced an action against the Commission for "the sum of \$8,190.78, being the balance due for electric power purchased by the defendants from the plaintiffs and which said balance remains due." A statement of claim followed on the 21st February, 1922, alleging an agreement to pay \$16 per horse power supply of electricity to the value of \$24,176.16, payments on account amounting to \$18,106.82, leaving due a balance of \$6,869.34. Certain smaller charges made up the claim to \$8,190.78, the sum mentioned in the consent. The plaintiffs alleged in the alternative that, if there was no agreement, the price of \$16 per horse power was a fair price.

The defendants denied the alleged agreement to pay \$16 per

App. Div.

1925.

BEACH
v.HYDRO-
ELECTRIC
POWER COM-
MISSION OF
ONTARIO.

Riddell, J.A.

horse power and alleged that the amount paid by them was "a fair and reasonable price;" they admitted liability for \$78, and paid the amount into Court.

Issue was joined. Before the case could come on for trial, the plaintiffs' counsel thought that a larger sum should be claimed, and intended to move at the trial to amend accordingly.

Counsel for both parties, on the 15th November, 1922, entered into an agreement for submission to arbitration in the following terms:—

"1. The parties have agreed that the matters in question in this action shall be referred to J. M. Robertson, of the city of Montreal, engineer, to determine what reasonable and just price should be paid to the plaintiffs for the power furnished by them to the defendants from the 1st April, 1916, to the 1st May, 1919, and to fix the amount due to the plaintiffs by the defendants after deducting the sum already paid the plaintiffs by the defendants.

"2. It is understood and agreed between the parties hereto that in the determination of these amounts the plaintiffs shall not be prejudiced by any claim made by them in the writ of summons or pleadings in this action.

"3. . . .

"4. It is understood between the parties that the provisions of the Ontario Arbitration Act, R.S.O. 1914, ch. 65, do not apply herein, and the said arbitrator herein may proceed informally, and, if he so desires, is not required to take evidence under oath.

"5. The decision of the said arbitrator shall be final and binding upon both parties."

An arbitration was accordingly had, with the result that an award was made on the 15th February, 1923, for \$42,247.70 and interest—in all, \$51,861.75.

A motion was made to set aside the award and an action brought on the 22nd May, 1923, to enforce it; both came on before Mr. Justice Wright, and on the 15th August, 1924, the motion was allowed and the action dismissed. The plaintiffs appeal.

It is the policy of the Legislature, representing the people of Ontario, to protect these defendants, not inaptly if without strict legal accuracy styled by Lord Finlay "a Government department"—*Electrical Development Co. of Ontario v. Attorney-General for Ontario*, [1919] A.C. 687, at p. 691—from actions at law of all kinds unless the consent of the Attorney-General shall be

first obtained—an action is not even to be brought without such consent.

There can be no question that the action brought was properly and regularly brought; but the consent given by the Attorney-General would not justify an action for a larger sum.

As to the amendment which it was intended to ask for at the trial, I am of the opinion that the Court must necessarily have refused any amendment increasing the amount sought beyond the limit fixed by the Attorney-General's consent—and that, even on consent given by the defendants. It never could be intended that a claimant, by setting up a claim for a small sum and obtaining thereby a consent from the Attorney-General to bring an action for that sum, could claim at the trial a larger sum, as to the propriety of permitting action for which to be brought, the responsible officer of the Crown had not given a decision. And the defendants are not entrusted with any power to give a valid and effective assent; not they, but the Attorney-General, plays the watch-dog's part in this matter. The defendants, with their strictly limited powers, could not have the right to assent to proceedings that would or might result in increasing the amount for which they would become liable.

The implied powers of a corporation have been the subject of much controversy—the whole question is discussed in Masten and Fraser's *Company Law*, 2nd ed., p. 102. Counsel for the appellants cite and rely upon *Bath's Case*, 8 Ch.D. 334, at p. 340, in which it is said:—

“In the first place, has a corporation or *quasi* corporation under the general law the same right to compromise claims brought against it as individual persons have? I cannot bring my mind to doubt the soundness of the affirmative of that proposition. I can see no reason why the general law should put a limit on the authority of corporations who are artificial persons, if I may say so, that it has not put on the authority of natural persons. It seems to me that principle—and authority, so far as it goes, that is the *dictum* of Lord Westbury in *Dixon v. Evans* (1872), L.R. 5 H.L. 606, 618—point to one conclusion, that corporations must have such power as an incident to their existence. It would be a startling proposition that, whereas an individual may always avoid having resort to litigation by compromising a claim against him, a corporation can never avoid it, but must either fight out the claim or make arrangements sanctioned by the order of a Court of Justice; yet such would be the result of holding that a corporation has no such general power.”

That is where the corporation can be sued like a natural indi-

App. Div.

1925.

BEACH

v.

HYDRO-
ELECTRIC

POWER COM-
MISSION OF
ONTARIO.

Riddell, J.A.

App. Div.
1925.
BEACH
v.
HYDRO-
ELECTRIC
POWER COM-
MISSION OF
ONTARIO.

Riddell, J.A.

vidual—and the Court had not under consideration a corporation like these defendants. I do not think any useful end will be met by discussing the general law. But in any event, a power to compromise, i.e., pay a smaller sum than is claimed, is very different from consenting to settle an action by agreeing to a proceeding which may in the result compel the payment of a much larger sum.

I am of the opinion that the reference to arbitration was *ultra vires* and the award a nullity *ab initio*.

Nor am I able to see how this nullity of the 15th February, 1923, can be given life by the document obtained *ex post facto*:—

“In the Supreme Court of Ontario.

“In the matter of a proposed action between Mahlon Wickway Beach, Benson Clothier Beach, and Charles Asa Beach, the Estate of Mahlon Ford Beach, plaintiffs, v. The Hydro-Electric Power Commission of Ontario, defendant.

“Pursuant to the provisions of the Revised Statutes of Ontario, 1914, chapter 39, section 16, I hereby consent to Mahlon Wickway Beach, Benson Clothier Beach, and Charles Asa Beach, executors of the estate of M. F. Beach, of the village of Iroquois, in the county of Dundas, bringing an action against the Hydro-Electric Power Commission of Ontario to recover the sum alleged to be due said estate for electric power supplied by said estate to the Hydro-Electric Power Commission of Ontario.

“This consent is to be deemed to have been given as of the 30th day of January, 1922.

“W. E. Raney, Attorney-General,

“Toronto, 20th April, 1923.”

If for no other reason, this belated consent allows an action for “the sum alleged to be due” on the 30th January, 1922; and that, we have seen, was \$8,190.78 and no more.

I take it for granted that any Attorney-General would as of course give his consent to an action “to determine what reasonable and just price should be paid to the plaintiffs for the power furnished by them to the defendants from the 1st April, 1916, to the 1st May, 1919, and to fix the amount due the plaintiffs by the defendants after deducting the sum already paid the plaintiffs by the defendants,” but no Attorney-General has in fact given such consent.

We were strongly pressed not to deprive the plaintiffs of their right of action by reason of what was called a technical defect.

This is to misconstrue both the duty of the Court and the nature of the objection.

It is for the Legislature, not the Court, to make the law—the Court can only construe the words of the Legislature and has no power to modify their effect. It has been decided by the Legislature responsible to the people of Ontario that the interests of these people will be best served by preventing all actions against the Commission except those to which the Attorney-General has given his consent. The Attorney-General, a member of the Administration, is responsible to his colleagues and with his colleagues to the House, the representatives of the people, for his decision—he and they are to be judged by what he and they actually do, not by what he or they would have done had they been asked. And the Court has no jurisdiction in the matter.

Nor is the objection a mere technicality: by the law of the land no one has any right of action against the Commission unless and until he has obtained the consent of the Attorney-General, and the Court can no more give such a right than it could until comparatively recently give a right of action to widow and orphans against the wilful or negligent slayer of husband and father.

Even were the submission to arbitration valid and the arbitrator allowed by law to make a valid award, the present award could not possibly stand.

I am not prepared to accede to the argument that the arbitrator based his award upon a mistake of fact, but do not decide that question. What is perfectly obvious is, that the arbitrator, against whose personal integrity and professional skill nothing has been or can be said, approached the consideration of the questions to be decided from a wrong angle. It is plain that he found elements of hardship which he imagined justified him in awarding a sum greater than he would have done under other circumstances. By reason of a wholly imaginary grievance which the plaintiffs or their testator were or was supposed to have suffered, he thought that a different and of course a greater sum should be awarded.

This is not the case of a wilful tort in which punitive or exemplary damages should be given, but a simple case of contract, express or implied—a common law *assumpsit*—and should have been treated as such: *Toronto Hockey Club v. Arena Gardens of Toronto Ltd.* (1924), 55 O.L.R. 509, at p. 518, and cases there cited.

One can well understand the defendants being startled at their being directed to pay for electricity several times the sum of

App. Div.

1925.

BEACH

v.

HYDRO-
ELECTRIC
POWER COM-
MISSION OF
ONTARIO.

Riddell, J.A.

App. Div. \$16 with which they had been billed, and which was all that was
 1925. claimed until after action brought.

BEACH
 v.
 HYDRO-
 ELECTRIC
 POWER COM-
 MISSION OF
 ONTARIO.

I would dismiss the appeal with costs. No real hardship will enure to the plaintiffs: they may proceed with the existing action which they thought they had settled—or may, if so advised, apply for a proper consent and bring a new action.

Riddell, J.A.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

1925. TORONTO HOCKEY CLUB V. ARENA GARDENS OF TORONTO LTD.

Oct. 2.

Damages—Breach of Contract—Measure of Damages—Evidence—Profits—Selling Value of Undertaking.

The order of ORDE, J.A., 55 O.L.R. 509, upon appeal from a Master's report, fixing at \$10,000 the amount of the damages payable by the defendants to the plaintiffs on account of the failure of the defendants in the autumn of 1918 to turn back to the plaintiffs the hockey-players, contracts, outfit, and franchise of the plaintiffs, as agreed, was affirmed on appeal.

Held, that the plaintiffs were limited by the terms of the judgment of reference to the ordinary damages for breach of contract.

The plaintiffs' contention that they were entitled to \$100,000 damages, based on expected profits at the rate of \$20,000 per annum for five years, was pressed to extinction by the weight of multiplied contingencies.

The true measure of damages was the value to the plaintiffs of the team, the outfit, and the franchise at the time the contract was broken.

The damages were not limited to what the plaintiffs would have reaped from the operation of the team during the season of 1918-19.

The selling value of the undertaking, including the present value of potential future profits, was the best basis of assessment available on the evidence.

AN appeal by the plaintiffs from the order of ORDE, J.A., 55 O.L.R. 509.

September 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

W. N. Tilley, K.C., and J. F. Boland, for the appellants, contended that the learned Judge in the Weekly Court was wrong in reducing the amount of damages payable to the appellants. The defendants were guilty of a breach of trust, and the damages should be ascertained by taking an account of the profits received by the defendant company, as trustee for the Toronto Hockey

Club. If the appellants were enabled, by the terms of the judgment of reference, to obtain damages for breach of contract only, they were then entitled to all the damages naturally flowing from the breach. The profits earned by the defendant company for the entire five years formed a true basis for ascertaining the damages, since the appellants would have been able to earn a like amount if the contract had not been broken.

A. C. McMaster, K.C., and *J. M. Bullen*, for the defendant company, respondent, contended that the only true basis upon which to compute the amount of damages was the value to the appellants of the subject-matter of the contract, at the time of the breach. Any other damages were too uncertain and speculative for the Court to consider.

R. T. Harding, K.C., for the defendants Quérrie and Vearncombe, respondents.

October 2. The judgment of the Court was read by *MASTEN*, J.A.:—Appeal from the order and judgment of Orde, J.A., dated the 26th April, 1924, and reported in 55 O.L.R. 509. The history of this litigation and the circumstances giving rise to it are chronicled in the printed report above mentioned. In consequence, such supplementary statement as seems desirable in connection with this appeal can be expressed the more briefly.

For some years prior to November, 1917, one Livingstone had been the managing proprietor of the plaintiff company, which company had control of (or, using the technical expression of the craft, “owned”) a professional hockey team. Its operations were carried on for gain, its income being derived from the sale to the public of tickets of admission to a series of matches played by the plaintiff club with other hockey clubs associated in a voluntary league known as “The National Hockey Association.” The amount of these gross receipts depends upon the fancy of the public and its interest in these matches. This interest is said to be stimulated if its matches are important, if the club plays well and if it holds a leading place in the series of matches scheduled by the association. The essentials to the enterprise are: first, a team; secondly, ice to play on; and, thirdly, other teams with whom to arrange a series of matches. I should add that the members of the team are professionals, who make their living, at least during the winter season, by playing hockey. The members of the plaintiffs’ team who were in 1917 transferred to the defendant company, as hereinafter stated, had been each severally employed by the plaintiffs under the terms of a certain contract, which, among other provisions, contained the following as clause 10:—

App. Div.

1925.

TORONTO
HOCKEY
CLUB

v.

ARENA
GARDENS OF
TORONTO
LTD.

App. Div.

1925.

TORONTO
HOCKEY
CLUB

v.

ARENA
GARDENS OF
TORONTO
LTD.

Masten, J.A.

"10. The player will, at the option of the club, enter into a contract for the succeeding season upon all the terms and conditions of this contract, save as to clauses 1 and 10, and the salary to be paid the player in the event of such renewal shall be the same as the total compensation provided for the player in clause 1 hereof unless it be increased or decreased by mutual agreement."

It thus appears that the players were hired not only for the season of 1917-18, but also at the option of the plaintiff company for the season of 1918-19, and not further. But it is contended that owing to the mutual agreements between the clubs constituting the National Hockey Association no player could obtain employment in another club of the National Hockey Association (which was the only league for professional hockey in Eastern Canada) without the consent of his former employer. It is contended that the result is that if the player desires to continue his profession as a hockey player he is tied permanently to the club that originally employed him unless transferred with its consent.

While clause 10 above quoted obligates the player for two years and no more, he customarily, at the beginning of the second year, signs a contract containing clause 10 and thus becomes obligated for the third year, and so continues from year to year. On this ground the plaintiff claims that the hiring of players, while it nominally lasts for two years only, is, practically speaking, for life, at the option of the hirer. Hence it is argued that the team of players turned over by the plaintiffs to the defendant company, and which should have been returned in December, 1918, was converted by the defendant company to its own uses in perpetuity.

In November, 1917, the plaintiff company had a team, but it had no ice of its own, though it is quite possible that, as in preceding years, ice could have been secured. Its main difficulty was that a certain hostility had developed between Livingstone, the managing proprietor of the plaintiff company, and the other clubs, members of the National Hockey Association, being the clubs with whom the plaintiffs' team had theretofore played. In the autumn of 1917 it seems likely that these other organisations would in the season of 1917-18 decline to admit the plaintiff company as a playing member of the National Hockey Association for the ensuing season. Under these circumstances it would have been difficult and perhaps impossible for the plaintiff company to secure opponents for any series of matches which the public would patronise. To meet this difficulty the plaintiff company entered into an agreement with the defendant company, dated the 9th November, 1917, the relevant provisions of which are fully set out

in the report of this case in the Court below, and need not be here repeated. Pursuant to that agreement, the plaintiff company turned over to the defendant company seven players, its outfit of uniforms, skates, etc., and its franchise in the National Hockey Association, and by the terms of the agreement it was to receive a certain proportion or percentage of the net profits of the season, and at the end of the season was to receive back from the defendant company the players and outfit which had been turned over to the defendant company for the season.

App. Div.
1925.
TORONTO
HOCKEY
CLUB
v.
ARENA
GARDENS OF
TORONTO
LTD.
Masten, J.A.

In pursuance of this agreement, the defendants, as members of the National Hockey Association, successfully operated the team during the season of 1917-18, and there became due to the plaintiffs, under the provisions of the foregoing agreement, some \$13,000, which has heretofore in the course of this litigation been duly accounted for by the defendants.

I pause here to say that many grounds of complaint appear in the two actions as originally launched, but with one exception these have all been settled during the course of this extended litigation, and the defendants, other than Arena Gardens of Toronto Limited, have now all been dismissed from the action. The one outstanding difference which forms the subject of this appeal is the amount of damages which has been adjudged to be payable by the defendants to the plaintiffs on account of the failure of the former in the autumn of 1918 to turn back to the plaintiff company the players and outfit, etc., as they had agreed to do by the terms of the agreement above mentioned. The ascertainment of these damages was referred to the Master in Ordinary, who found the plaintiffs entitled to \$100,000, which amount was reduced by Orde, J.A., to \$10,000.

There is no cross-appeal by the defendants, so that the question before this Court is, whether the judgment of Orde, J.A., was wrong in fixing the damages payable to the plaintiffs by Arena Gardens of Toronto Limited at the sum of \$10,000, and if he was wrong then by how much this sum should be increased. On p. 519 of 55 O.L.R., Orde, J.A., states the questions to be disposed of by him as follows:—

“1. The damages to be assessed being for a breach of the defendant company's contract to deliver up the contracts with the seven defendant players, what is the measure thereof? 2. Or are the damages to be assessed as upon a breach of trust by the defendant company in failing to deliver up the player contracts, and, if so, are they to be assessed in the present case upon any

App. Div. principles different from those applicable to a breach of contract ?”

1925.

TORONTO
HOCKEY
CLUB
v.

ARENA
GARDENS OF
TORONTO
LTD.

Masten, J.A.

Upon the present appeal, the contention that the amount payable by the defendant company was to be computed by taking an account as against a trustee of the profits which it had received, or ought to have received, was presented (somewhat faintly I am bound to say); as was also the claim that punitive damages might still be assessed as for tort. But the answer to both these contentions is that by the terms of the judgment of reference they are precluded. The judgment of the trial Judge directed as follows:—

“(3) And this Court doth further order and adjudge that the defendant do within one week after service hereof deliver to the plaintiff the contracts of players, leased by the plaintiff to the defendant and retained by the defendant, and in default thereof that it be referred to the Master in Chambers of this Court to ascertain and state what damages the plaintiff hath sustained by reason of the non-delivery up of the said contracts as hereinbefore directed.”

But on appeal to the Divisional Court the reference was directed in the terms following:—

“(3) And this Court doth further order and adjudge that it be referred to the Master in Ordinary of this Court to ascertain and state the damages sustained by the plaintiff by reason of the said plaintiff company being deprived of the services of the defendants Corbett Dennennay, E. Reginald Noble, Harry Cameron, Harry Meeking, Kenneth Randall, Alfred Skinner, and Jack Adams as hockey players, in breach of the contract between the plaintiff and the defendant the Arena Gardens of Toronto Limited, in the pleadings mentioned.”

If the plaintiff company desired to compute its claim on some basis other than breach of contract, it should have secured, in the judgment directing the reference, a provision to that effect. The form of such a judgment is well settled. It seems to me plain that the plaintiff company is limited by the terms of the judgment of reference to the ordinary damages for breach of contract.

Mr. Tilley's main contention was based upon that view, viz., that the plaintiff company was entitled to such damages as might fairly and reasonably be considered as naturally arising from a breach of the defendant company's contract according to the usual course of things, or in the alternative that such damages are recoverable because in the circumstances they must have been in

the contemplation of the parties when the contract was made as being likely to arise in consequence of its breach. App. Div.

1925.

TORONTO
HOCKEY
CLUB
v.

ARENA
GARDENS OF
TORONTO
LTD.

Masten, J.A.

The first question to be considered is, whether the profit made in the season of 1919-20 and succeeding years by the St. Patrick Club (to which four of the plaintiff company's players were transferred in 1919) constitutes the true measure of the damages which the plaintiff company is entitled to recover. In support of that view, Mr. Tilley urged that the organised team of players to whose return the plaintiff company was entitled did as an aggregation constitute an instrument capable of making for its owner a profit of \$20,000 per year, and that this figure was not speculative, because, owing to lapse of time, it had been demonstrated that the St. Patrick's Club team, on which four of the seven played, made at least \$20,000 in the year 1919-20 and in each of the succeeding years, and he argued that if the defendant company had in December, 1918, returned the team of players and the outfit, etc., according to agreement, Livingstone, as a capable and efficient manager, would have been able to make the same profit during succeeding years as was made by the St. Patrick Club with these players. Consequently, he argues that the allowance by the Master of five years' profits of \$20,000 per year is warranted by the evidence and those profits constitute the true basis on which the damages should be assessed.

In answer to this argument it is pointed out that for successful operation three things are essentially requisite—a team, ice to play on, and a league with the members of which matches of interest to the public can be arranged. While the plaintiff company had seven good players, it had no ice and no league. Possibly it might have secured ice. It seems very doubtful whether it could have secured opponents for matches, that is, whether the other clubs forming the National Hockey Association would have arranged matches with the plaintiff club in 1917-18 and succeeding years, and equally doubtful whether upon such refusal the plaintiff club could have secured any matches attractive to the public. The possibility of being able to use the team in 1917-18 was therefore contingent on securing ice and on securing opponents for matches. Again, seven players do not constitute an effective playing team. There must be from three to seven spare men on a first-class team to provide for contingencies. The plaintiff club's success was contingent on securing additional skilled men, and such men were scarce and difficult to secure. Further financial success is contingent on good management and on successful co-operation between the manager, the players, and the

App. Div. other clubs. It is also contingent on the whim of the public and
 1925. their attitude towards hockey for that season. This is shewn by
 TORONTO the fact that, while large profits were made in some years, yet for
 HOCKEY several years prior to 1915-16 the plaintiff company made no
 CLUB profits, and in 1918-19 the operation of this team under Vearn-
 v. combe involved a loss of many thousands of dollars. The venture
 ARENA is therefore essentially speculative and contingent.
 GARDENS OF
 TORONTO
 LTD.

A further contingency arose from the fact that in 1917 the
 Masten, J.A. players turned over by the plaintiffs to the defendants were legally
 bound for two years and no more, as I have already pointed out,
 and any player might or might not have been willing to continue
 after the expiry of the two years.

Upon a consideration of all these circumstances, I am led to
 the conclusion that the plaintiff company's contention that it is
 entitled to \$100,000 damages, based on expected profits at the
 rate of \$20,000 per annum for five years, is, to quote the phrase
 of McCardie, J., in *Barnett v. Cohen*, [1921] 2 K.B. 461, at p.
 472, "pressed to extinction by the weight of multiplied contin-
 gencies."

The same conclusion may be reached from another aspect.
 Can it be said that evidence of the profits made by the St. Pat-
 rick Club in the season of 1919-20 and succeeding years with a
 team of fourteen players, four only of whom had belonged to the
 plaintiff company, operating under different management in a
 new league, is relevant to establish what Livingstone could have
 done with seven players under the adverse conditions that con-
 fronted him? I therefore agree with the view of Orde, J.A., ex-
 pressed on p. 522 of the report, where he says:—

"Having regard to the peculiar nature of the subject-matter
 of the contract and to its precarious and uncertain value, it would
 have been a matter of great difficulty, if not impossible, for the
 plaintiffs to have established a right to damages to any such
 amount as \$100,000 or five years' prospective profits of \$20,000
 per year, even if the player contracts had been for five years in-
 stead of only one. The case would be well within *Corbet v. John-
 son* (1884), 10 A.R. 564, 575, and *Pullan v. Jones* (1911), 3
 O.W.N. 361. The profits would be too speculative and uncertain
 to form the basis for a computation of damages."

Nor do the operations under Vearncombe in the season of
 1918-19 afford any assistance in ascertaining the true amount of
 the damages, for there were no profits in that year. As to the
 recovery of anticipated and speculative profits, I refer to the
 judgment of Davies, J., in *Corbin v. Thompson* (1907), 39 Can.

S.C.R. 575, at p. 580; to Mayne on Damages, 9th ed., p. 56 *et seq.*; App. Div. and to Arnold on Damages and Compensation, 2nd ed., p. 112.

The real question is, what was the value to the plaintiff company of the team, the outfit, and the franchise at the time when the contract was broken?—that is, as I understand it, in November or December, 1918.

In Arnold on Damages and Compensation, 2nd ed., p. 25, he sums up the effect of the cases as follows:—

“The conclusion to be arrived at is that where the contract is broken the cause of action at once accrues. The plaintiff may immediately sue for damages, and the measure of damages must be assessed as being the loss or injury sustained at the date of the breach of contract. But, for the purpose of estimating the present loss, probable future events must be considered, and if the bringing of the action be delayed, evidence as to actual subsequent consequential damages or subsequent relevant facts in mitigation of damage may be given.”

On this phase of the case Orde, J.A., in discussing the question of profits made subsequent to the breach, says at p. 523:—

“For these reasons, I do not think it was proper for the Assistant Master under the judgment of reference to include in his assessment of the damages resulting from the defendant company’s breach of its contract any other loss than that immediately resulting from the failure to get back the contracts of the seven defendant players. The damages must be limited to what the plaintiffs would have reaped from the operation of the team under those contracts during the season of 1918-19.”

I am unable to agree with this statement, because at the end of the season of 1918-19 there remained two alternative elements of value, viz., the price at which such an organised team could be sold, and, secondly, the chance or probability that, if not sold, the team or many members of it would remain with the plaintiff company after 1919 and assist in carrying on a profitable enterprise. That chance or probability possessed a pecuniary value to the plaintiffs, and by the action of the defendants that chance was destroyed. It therefore forms a ground upon which the plaintiffs are entitled to recover damages, as is shewn by the case of *Chaplin v. Hicks*, [1911] 2 K.B. 786. For these reasons, I am unable to agree with this statement of Orde, J.A., that damages must be limited to what the plaintiffs would have reaped from the operation of the team under those contracts during the season of 1918-19. But, if I follow his reasons correctly, the learned Judge did not in the end base his finding of \$10,000 damages on any

App. Div.

1925.

TORONTO
HOCKEY
CLUB
v.

ARENA
GARDENS OF
TORONTO
LTD.

Masten, J.A.

App. Div. probable profits in 1918-19, for what he says at p. 524 is as follows:—

1925.

TORONTO
HOCKEY
CLUB
v.
ARENA
GARDENS OF
TORONTO
LTD.

Masten, J.A.

“There is in evidence a significant letter, dated the 12th December, 1917, from Livingstone to Mr. Claxton, who was representing the defendant company in the negotiations, offering to sell the team, franchise, and all other rights for \$15,000. This offer was open for acceptance at any time before the 15th April, 1918. It was not accepted; but, while it is not necessarily a measure of the capital value of the team during the following season, it does provide a test of its capital value at the commencement of the season of 1917-18. It is fair of course to keep in mind that when the offer was made there had been three successive seasons of loss, and that the season then commencing ultimately proved a profitable one. But it does not follow that the plaintiffs could have reaped the same profits as the defendant company, even with membership in the league and a rink to play in. I think it is fair to assume, however, that the plaintiffs, with the player contracts in their possession, even without membership in the league and without a rink, might during the summer of 1918 have been in a position to sell or transfer the contracts to some other team for the following season or to negotiate for reinstatement in the league. What the value of that strategic position would have been is, I fear, really a matter of speculation. But I desire to avoid, if possible, a reference back to the Master to assess damages upon the proper footing. Having regard to the fact that Livingstone placed a capital value upon the team and franchise in 1917 of \$15,000, and to the fact that the defendant company reaped some benefit from the subsequent sale or transfer of the contracts, I think that I am giving to the plaintiffs the utmost of the damages to which, according to the measure by which in my view they are to be assessed, they are entitled, if I fix them at \$10,000.”

He therefore appears to base his finding not on profits made in 1918-19, but on the selling value of the undertaking, including the team, and I agree that this is the best basis available on the evidence, including as it does the present value of potential future profits. The judgment below is founded largely on an offer made by the plaintiffs in December, 1918, to sell for \$15,000, but in addition there is, if I understand the evidence aright, a sale by Vearncombe to the St. Patrick Club made in 1919 for \$7,000. This was a year after the breach of contract, and Livingstone's offer was a year before the breach of contract. It is plain, therefore, that in 1917 the undertaking was not worth in cash more

than the \$15,000 for which Livingstone offered to sell it; that offer was not accepted presumably because the buyer thought it was too high; and, on the other hand, the undertaking was worth in 1919 not less than \$7,000, because it was sold for that sum in that year. It should be remembered that in 1918 the team reached its highest point of value, having won the championship in the 1917-18 series of games.

While I look on the conduct of the defendants as utterly dishonest and despicable, and would be glad to find a legitimate basis on which to increase the finding of \$10,000 damages made by the Court below, yet I find myself unable to discern any warrantable basis in law on which to base such an increase. I therefore reach the conclusion that the judgment below is right and that this appeal should be dismissed with costs.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

BOLAND V. CANADIAN NATIONAL RAILWAY CO.

1925.

Oct. 2.

Railway—Canadian National Railway Company—Powers of Expropriation—Dominion Railway Act, 1919, sec. 287—Order of Board of Railway Commissioners—Expropriation Act.

The judgment of ORDE, J.A., 56 O.L.R. 653, was affirmed.

Held, that the case came within the provisions of sec. 257 of the Dominion Railway Act, 1919, 9 & 10 Geo. V. ch. 68; and the order of the Board of Railway Commissioners, made under the authority of that section, was sufficient to justify what was done by the defendants.

Per RIDDELL, J.A.:—The Expropriation Act, R.S.C. 1906, ch. 143, is really conclusive.

AN appeal by the plaintiff from the judgment of ORDE, J.A., 56 O.L.R. 653.

September 18. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

W. R. Smyth, K.C., and *J. F. Boland*, for the appellant, contended that, since the expropriation was a proceeding under an order of the Board of Railway Commissioners, it was governed by the special Act incorporating the Canadian National Railway Company, 1919, 9 & 10 Geo. V. ch. 13, sec. 13. As the plan was a highway and railway crossing plan, that section applies, to the

App. Div.

1925.

TORONTO
HOCKEY
CLUB
v.
ARENA
GARDENS OF
TORONTO
LTD.

MASTEN, J.A.

App. Div.

1925.

BOLAND
v.CANADIAN
NATIONAL
RAILWAY
Co.

exclusion of the Expropriation Act, R.S.C. 1906, ch. 143. If sec. 11 of the Expropriation Act was applicable at all, it applied only in so far as not inconsistent with sec. 13 of the special Act of 1919. The expropriation of the property of one person to give it to another is not within the jurisdiction of the Railway Board, and the purposes of the expropriation were not incidental to the work of the railway, and so the proceedings could not properly be brought within sec. 13 of the special Act of 1919. The expropriation was not an "undertaking" of the railway company, as defined in the Dominion Railway Act, 1919, 9 & 10 Geo. V. ch. 68, sec. 2 (35). On the question of the jurisdiction of the Board of Railway Commissioners, reference was made to the special Act of 1919, secs. 14 and 15. If the Expropriation Act did apply and did give power of expropriation for purposes of this kind, the Act was *ultra vires* of the Dominion Parliament. Moreover, the consent of the engineer of the Railway Board was a condition precedent to the expropriation, and this condition had not been complied with at the time this action was brought, and the expropriation was an interference with the administration of justice within the Province: *British North America Act*, sec. 92, head 14. Reference to *Toronto Railway Co. v. City of Toronto*, [1920] A.C. 426; *British Columbia Electric Railway Co. v. Vancouver Victoria and Eastern Railway and Navigation Co.*, [1914] A.C. 1067; *Canadian National Railway Co. v. Croteau*, [1925] S.C.R. 384.

W. N. Tilley, K.C., for the defendant company, respondents, contended that the Expropriation Act was the governing Act, and that, as soon as the railway company was ordered to construct the subway, this expropriation became part of the "undertaking" of the company, within the meaning of sec. 2 (35) of the Railway Act, 1919. He argued that the order of the Board of Railway Commissioners was directory and not permissive, and referred to secs. 257 and 258 of the Railway Act, 1919, and contended that the respondents were obliged to carry out the order. The expropriation was not for the purpose of mitigating the damages for which another party might have a cause of action against the railway company, but to make provision for vehicular and pedestrian traffic. Section 15 of the special Act of 1919 merely states the forum for the determination of rights.

Edward Bayly, K.C., for the Attorney-General for Ontario.

October 2. MIDDLETON, J.A.:—An appeal by the plaintiff from the judgment of Mr. Justice Orde delivered on the 12th March, 1925, after the trial of the action.

The facts are fully set forth in the full and careful judgment of my learned brother, and need not be here repeated.

I agree with the contention of Mr. Tilley that the conclusion arrived at may be supported upon a broader ground than that upon which the trial Judge rests his judgment, and that it is not necessary now to discuss all the various matters dealt with by him. The case is, I think, within the provisions of sec. 257* of the Dominion Railway Act, 1919, 9 & 10 Geo. V. ch. 68, and the order of the Board of Railway Commissioners, made under the authority of that section, is sufficient to justify all that has been done by the defendants.

Where a railway is already constructed and crosses a highway at the level, a situation of extreme danger to the public may well arise; and this section authorises the Board to call upon the railway company, for the protection, safety, and convenience of the public, to construct such works that the railway may be carried over or under the highway "and that such other work be executed" as may "under the circumstances appear to the Board best adapted to remove or diminish the danger."

A situation of danger unquestionably existed at the intersection in question; and the Board, upon hearing all parties concerned, determined that this danger and inconvenience could best be removed by the construction of a subway, and directed that plans be prepared by competent engineers shewing how this could best be accomplished. The Loblaw Company owned a warehouse fronting upon Bloor street at its level, and ingress and egress to and from this warehouse were obtained over Bloor street. If the street were depressed and nothing done to relieve the situation, no means of ingress or egress would be afforded to the Loblaw

257. (1) Where a railway is already constructed upon, along or across any highway, the Board may, of its own motion, or upon complaint or application, by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient, or may order that the railway be carried over, under or along the highway, or that the highway be carried over, under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

App. Div.

1925.

BOLAND

v.

CANADIAN
NATIONAL
RAILWAY
Co.

Middleton,
J.A.

App. Div.
1925.
BOLAND
v.
CANADIAN
NATIONAL
RAILWAY
Co.
Middleton,
J.A.

Company and great damage would be done to it. To obviate this, the Board provided that a strip of land adjoining the Loblaw warehouse and owned by the plaintiff should be taken as part of the works authorised and directed. This strip would be available to the Loblaw Company as a sloping way by which it would enter its warehouse from the subway; but the title to this strip would be and remain in the railway company. Subsection 2 of the section referred to provides that all the provisions of law applicable to the taking of land by the company, its valuation and sale and conveyance to the company, and the compensation to be paid therefor, "shall apply to the land, exclusive of the highway crossing, required for the proper carrying out of any order made by the Board." In my view this concludes the whole case. The Board, in a case in which it had jurisdiction, directed the carrying out of the works shewn and specified in its order; and, under the statute, this empowered the railway company to invoke the expropriation sections of the statute for the purpose of obtaining title to this land required for the proper carrying out of the provisions of the order so made.

What is to be done and how it is to be done is by the statute a matter to be determined solely by the Railway Board, and this Court has no jurisdiction to go behind the order of the Board in any respect.

The argument for the plaintiff proceeds upon the assumption that what is being done is taking the land from A. for the purpose of conveying it to B., so that the damage payable by the railway company to B. for the construction of the works undertaken may be minimised. It is sufficient to say that this is not what is being done. The land taken is being taken for the purpose of the works, and the title to it will remain in the railway company. There is, however, a more serious difficulty in the argument than this. What is being done is not the forwarding of a scheme of the railway company for its own purposes; it is a work undertaken by direction of the Board for the purpose of protecting the public from an existing danger; and I can see no reason why the Board, in devising a scheme to obviate this danger, should be prevented from adopting a scheme which will, while affording protection to the public, do the minimum of damage to those whose property must be prejudicially affected by the works undertaken, and why, in planning these works, every device should not be employed to avoid inflicting serious injury on one, even though this may involve the expropriating of the property of another. Mr. Smyth lays great stress upon the words of the section authorising the exercise of the powers for the

purpose of diminishing the public danger; and, while this unquestionably is the motive for which the work is to be undertaken, the choice of the precise method, it appears to me, may well be regulated by other considerations such as minimising the damage payable and lessening as far as practicable the inconvenience to adjoining owners.

This being sufficient to sustain the judgment now in review, it becomes unnecessary to enter upon the discussion of the questions arising as to the true construction of the statute relating to the Canadian National Railways. Nothing that was said upon the argument leads me to think that this Act and its effect in bringing into operation the provisions of the Expropriation Act were misconstrued by my learned brother.

The appeal, in my view, fails and must be dismissed with costs.

LATCHFORD, C.J., and MASTEN, J.A., agreed with MIDDLETON, J.A.

RIDDELL, J.:—I agree, and remain of the opinion, expressed at the hearing, that the Expropriation Act is really conclusive.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

RE DOTY AND MARKS.

1925.

Oct. 2.

Landlord and Tenant—Overholding Tenant—Successive Applications for Possession under Landlord and Tenant Act, Part III.—Dismissal on Account of Irregularities in Procedure—Renewal on New Material Supplying Defects in Former Applications—Res Judicata—Notice to Quit—Subsequent Demand of Possession and Notice of Intention to Distrain—Sec. 34 of Act—Waiver.

A landlord, seeking to obtain possession of the demised premises from an overholding tenant, made four unsuccessful applications to a County Court Judge under Part III. of the Landlord and Tenant Act. Three of the applications were dismissed because of irregularities in the landlord's procedure, and the fourth because the County Court Judge considered that the matter was *res judicata* by reason of the dismissal of the three earlier motions:—

Held, upon appeal from the order dismissing the fourth application, that the failure of the previous applications having arisen from defects that prevented the merits from being considered, a new motion could properly be made when the defects were remedied.

App. Div.

1925.

BOLAND
v.

CANADIAN
NATIONAL
RAILWAY
Co.

Middleton,
J.A.

1925.

Payne v. Newberry (1890), 13 P.R. 392, explained.*Dombey & Son Ltd. v. Playfair Brothers*, [1897] 1 Q.B. 368, and *Barber v. McCuaig* (1900), 31 O.R. 593, applied and followed.RE DOTY
AND MARKS.

After giving notice to quit, the landlord served upon the tenant a notice, under sec. 34 of the Act, demanding immediate possession, and stating the landlord's intention to distrain upon exempted goods if possession was not given accordingly:—

Held, that this did not waive the former demand for possession nor create a new tenancy.

AN appeal by the landlord from an order of the Judge of the County Court of the County of Lincoln dismissing the appellant's application for an order, under Part III. (Overholding Tenants) of the Landlord and Tenant Act, R.S.O. 1914, ch. 155, for possession of the demised premises.

Previous to the application from the dismissal of which the appeal was taken, three applications for the same purpose had been made to the County Court Judge, and each of them had been dismissed.

October 1. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

P. R. Morris, for the appellant, argued that the matter was not *res judicata*, as the merits were not in question on any of the preceding motions, and therefore could not have been adjudicated upon: *Payne v. Newberry* (1890), 13 P.R. 392; *McIntosh v. Parent* (1924), 55 O.L.R. 552. The appellant acted within his rights under sec. 40 of the Landlord and Tenant Act in serving a distress notice after the tenancy had been determined.

F. W. Griffiths, for the tenant, respondent, contended that the matter was *res judicata* because of the dismissal of the three preceding motions. The landlord could not be allowed to keep on making these motions indefinitely: *Payne v. Newberry* (*supra*). Section 40 of the Landlord and Tenant Act had no application to a monthly tenancy; and the tenancy, having been determined by the notice to quit, was revived by the service of the notice under sec. 34 demanding immediate possession, and thus a new tenancy was created: *Bridges v. Smyth* (1829), 5 Bing. 410; *Jones v. Carter* (1846), 15 M. & W. 718; *Franklin v. Carter* (1845), 1 C.B. 750.

October 2. The judgment of the Court was read by MIDDLETON, J.A.:—That the landlord is the owner of the property, and that the tenant is in possession under him as a monthly tenant, is not disputed. That he is and has been for a long time in possession of the property without paying rent is equally certain.

That a notice to quit was served long since is not denied. Yet the landlord has failed to obtain possession of the property, owing to irregularities in his procedure in his endeavour to invoke the provisions of an Act intended to give a landlord a simple and expeditious method of obtaining redress against a defaulting tenant.

A series of four applications have all resulted adversely to the landlord. The first came to grief because the requisite papers had not been personally served; the second because of some defect in the brief statement of facts necessarily accompanying the notice of hearing under the provisions of sec. 75(3). The third met the fatal objection that the affidavits had not been duly filed. On the fourth hearing the landlord was told that his right to recover was gone because the matter was *res judicata* by reason of the dismissal of the three previous motions.

If this is indeed so, the landlord is in sorry plight, for the plea of *res judicata* would logically be equally an answer to any proceedings that he might take to recover possession of his house.

The judgment proceeds upon a very curious misunderstanding of the judgment in *Payne v. Newberry*, 13 P.R. 392, a decision of the late Master in Chambers, Mr. Dalton. There, a motion for judgment had been dismissed as being improperly made after an order for security for costs had been issued, and while it had not been complied with. The order was complied with and a new motion made. It was argued that the dismissal of the first motion precluded the making of the second motion. It was said "that a matter once judicially decided cannot be again litigated." The learned Master speaks of this principle as one of wide application, governing alike judgments in the cause and interlocutory proceedings in the course of an action, and then states: "The question is, how and why the first motion was dismissed; it may be conclusive against the party moving the second motion, or it may be no obstacle to him at all. The question is, has there been a judicial decision against the plaintiff on the case he submits? There has been such a decision as would conclude the mover, if he omitted to shew matters in his material, from mistake or inadvertence it may be, which were necessary to the completeness of his case. . . . In such a case the first adverse judgment would be taken to be on the whole case, and would prevent a second motion." The Master then points out that if the failure of a first motion arose from defects that prevented the material facts of the case from being considered at all, the same result would not follow. A new motion might be made when the defects were remedied.

This is quite consistent with the decision of the Court of Appeal in *Dombey & Son Ltd. v. Playfair Brothers*, [1897] 1 Q.B. 368,

App. Div.

1925.

RE DOTY
AND MARKS.Middleton,
J.A.

App. Div.
1925.
RE DOTY
AND MARKS.

Middleton,
J.A.

where the first motion for judgment failed on a technical objection, and it was said that this did not preclude the second application, for the first "was nothing like a judicial decision on the case."

The case of *Barber v. McCuaig* (1900), 31 O.R. 593, is an exhaustive investigation by the late Chief Justice of Ontario of this question. An action had been prematurely brought, and consequently failed. After the lapse of the requisite time, a second action was brought. The dismissal of the first action was relied upon as an answer. It was held that it was open to the Court to ascertain the reason for the earlier decision, and, upon it being shewn, the plea failed.

Other cases to the same effect may be found collected in vol. 21 of the English and Empire Digest, p. 200.

An endeavour was made to support the judgment in review by suggesting that the provisions of sec. 40 of the Landlord and Tenant Act had no application to a monthly tenancy, and that the tenancy, having been determined by the notice to quit, was revived by the service of a notice under the provisions of sec. 34 demanding immediate possession, and stating the landlord's intention to distrain upon exemptions as permitted by that section, if possession was not given accordingly.

It was suggested that this waived the former demand for possession and created a new tenancy. We find ourselves quite unable to follow this argument. It is plain from the cases cited and many others that if the landlord does anything inconsistent with the position he has previously taken, an estoppel may be created, but we are unable to see that in adopting this course the landlord has taken any position inconsistent with the earlier termination of the tenancy.

The appeal should be allowed and the order for possession should go. The tenant should pay the costs of the appeal and of the final application to the Judge below. Costs of the earlier applications have been already dealt with by the County Court Judge.

Appeal allowed.

[GRANT, J.]

RE DEMPSEY AND MIDLAND LOAN AND SAVINGS CO.

1925.

Oct. 10.

Mortgage — Printed Form of Mortgage-deed — Construction of Clause Giving Mortgagor Privilege of Paying Additional Sums on Account of Principal on Days Fixed for Compulsory Payment of Instalments — Blank Space for Amount not Filled in — Inadmissibility of Extrinsic Evidence — Rule 605.

In a mortgage-deed there was a proviso for repayment by instalments upon certain fixed days of the principal moneys advanced, followed by a clause providing that "on any day hereinbefore appointed for the payment of any instalment of principal the said mortgagor may pay a greater sum on account of principal up to in all dollars without any extra charge for the said privilege." The mortgage was made in pursuance of the Short Forms of Mortgages Act and was upon a printed form used by the mortgagee (a loan company). Blank spaces in the printed form were left to be filled in, but the space between "all" and "dollars" was not filled in, nor was the clause stricken out:—

Held, upon a summary application for an order determining the mortgagor's rights under the mortgage-deed, that the Court was bound to interpret the document as it stood, without the aid of extrinsic evidence; as the mortgagee, whose solicitor prepared it, had not stricken out the clause and had not limited the "greater sum on account of principal" which the mortgagor was privileged to pay, the Court would not be justified in placing any limit upon such amount; and the mortgagor was privileged to pay any greater sum on account of principal on any of the appointed days without any extra charge for the privilege.

Review of the authorities upon the question of the admission of extrinsic evidence.

No opinion expressed upon the question whether the application came properly within the purview of Rule 605.

MOTION by Peter C. Dempsey, mortgagor, under Rule 605, for an order determining and declaring the applicant's rights under a certain mortgage-deed, upon the construction of which those rights depended.

October 7. The motion was heard by GRANT, J., in the Weekly Court, Toronto.

H. J. Smith, for the applicant.

R. J. McLaughlin, K.C., for the Midland Loan and Savings Company, the mortgagee.

October 10. GRANT, J.:—The mortgage bears date the 1st May, 1922, and was made by Peter C. Dempsey, his wife, Helen May Dempsey, joining therein to bar her dower, unto the Midland Loan and Savings Company. The mortgage is made in pursuance of the Short Forms of Mortgages Act, and is upon a printed

Grant, J. form of and in general use by the loan company. The form used,
1925. as is customary, contains a large number of provisions for the
RE DEMPSEY protection of the mortgagee, expressed in carefully drawn para-
AND graphs, and in some instances these printed paragraphs of the
MIDLAND form leave spaces which are intended apparently either to be filled
LOAN AND up in each case with appropriate words, or presumably, if the para-
SAVINGS CO. graphs in which spaces are left in the form are not so filled in,
they are to be stricken out altogether.

The particular paragraph in the printed form used in the case under consideration reads as follows:—

“ Provided that on any day hereinbefore appointed for the payment of any instalments of principal the said mortgagor may pay a greater sum on account of principal up to in all dollars without any extra charge for the said privilege, and upon each such payment in reduction of principal money, interest upon the amount so paid shall thereupon cease to be further payable thereafter on the said amount.”

In order that this paragraph may be intelligible, it is necessary that we should examine the earlier provisions of the mortgage in regard to the payment of principal. The main provision in that regard, excluding portions of it which do not affect the present problem, reads as follows:—

“ Provided this mortgage to be void on payment at the office of the mortgagee . . . of ten thousand dollars in gold coin or its equivalent of lawful money of Canada with interest at eight (quarterly) per centum per annum as follows: the sum of one hundred (\$100.00) dollars to be due and payable on account of principal quarterly on the first day of August and November, 1922, on the first day of February, May, August, and November in each of the years 1923 to 1931 inclusive, one hundred (\$100.00) dollars on the first day of February, 1932, and the balance of principal then remaining on the first day of May, 1932.”

On or about the 29th July, 1925, the solicitor for Dempsey, the mortgagor, forwarded to the loan company, at their head-office at Port Hope, a cheque for \$9,078, represented to be the total amount of principal secured by the mortgage plus \$178 for interest on the said principal up to the 1st August, 1925. The solicitor for the mortgagor at that time contended, and on this application persists in the contention, that the mortgagor, under the printed paragraph above quoted from the mortgage, but in which the space or blank appears before the word “dollars,” is given the right and privilege to pay off the whole or any part of the principal on any one of the days fixed by the earlier provisions of the mortgage for

payment of instalments of principal. The mortgagee company and counsel on the other hand take the position that the mortgagor has no such right or privilege, and this application is made to the Court, under Rule 605, for construction of the mortgage.

Upon the question being mentioned, counsel for both parties expressly consented to my dealing with this matter without having to take into consideration the question whether properly the application comes within the purview of Rule 605, and therefore upon this latter point I express no opinion.

The contentions of counsel for the mortgagor and mortgagee respectively were briefly as follows:—

(1) That of counsel for the mortgagor, that the paragraph in question is to be read and construed as if there were inserted in the space after the word “all” and before the word “dollars” words which would mean an unlimited number or any number at the option of the mortgagor; or, to express it in another way, that the paragraph should be interpreted in the same manner as if the words after the word “principal” in the second line (such words being “up to in all dollars”) were stricken out as surplusage and having no meaning in this particular case because no limited number of dollars was inserted in the space.

(2) That of counsel for the mortgagee, that the paragraph should be interpreted as if the blank space had inserted in it the word “no,” so that it would read “may pay a greater sum on account of principal up to in all no dollars,” the intention being, as it was argued, that, there being no arrangement for any further or additional payment on account of principal beyond the sum of \$100 quarterly, the paragraph is to be taken as if it did not exist.

Counsel were unable to refer me to any direct authority bearing upon the point, and my further search has not disclosed any case on all fours with or indeed in any way nearly approaching the question to be determined.

There are numerous cases dealing with the construction of wills in which blank spaces have been left, and constructions have been placed upon such wills by the courts varying with changing contexts and in some cases affected by surrounding circumstances.

There appears to be a fairly well-settled rule of construction to the effect that where there exists an ambiguity in a will extrinsic evidence may be adduced to clear up the ambiguity—e.g., to identify a person referred to by a nickname or in some manner known to the testator’s immediate relatives. Numerous other cases might be cited in support of this rule of construction.

The present case, however, apart from the fact that it is a case

Grant, J.

1925.

REDEMPEY
AND
MIDLAND
LOAN AND
SAVINGS CO.

Grant, J. of a mortgage and not of a will, does not appear to me to be a case
1925. of an ambiguity, but rather a case of inapt expression.

RE DEMPSEY
AND
MIDLAND
LOAN AND
SAVINGS CO.

Counsel for the mortgagee presented for consideration correspondence which had taken place at or immediately prior to the time when the mortgage was given, for the purpose of shewing that it was not the intention of the parties that the mortgagor should have the privilege of paying any further sum on account of principal or indeed any sum other than the quarterly payment of \$100.

It is undoubtedly true that in some cases extrinsic evidence may be given of surrounding circumstances, including probably correspondence which passed at or before the time when the document was executed, for the purpose of explaining something in the document which upon its face requires explanation, or in other words an ambiguity; but the cases in which such extrinsic evidence is admissible are, in my understanding of the rule, limited strictly to those in which there is some ambiguity which requires explanation.

Counsel referred to the case of *Bank of New Zealand v. Simpson*, [1900] A.C. 182, in support of his contention that the correspondence which passed prior to the time the mortgage was given should be admitted to shew the intention of the parties. In this *Bank of New Zealand* case it is undoubtedly held that where there is ambiguity the extrinsic evidence may be admitted, but it is also very clearly stated in the same report that such extrinsic evidence will be admitted only where the language of the document is "susceptible of more than one meaning."

So also in the case of *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, at p. 215, where, dealing with the question of the admission of extrinsic evidence, Kelly, C.B., states: "It is only when it is impossible upon the face of the deed to collect the true intention, or when something appears shewing that it does not truly express that intention, that extrinsic evidence can be resorted to . . . to supply or correct that deficiency." The "something" appearing must be something within the four corners of the document itself.

The general rule against the admission of extrinsic evidence where the contract between the parties is reduced to writing is thus expressed in Beal's Cardinal Rules of Legal Interpretation, 3rd ed., at p. 101: "If a contract be reduced to writing, or its terms be evidenced by writing, whether by agreement of the parties or in compliance with the terms of a statute, the writing governs the rights of the parties."

On the other hand, at p. 132 of the same volume, the author, after referring to the fact that it is necessary to bear in mind that there is a distinction between the cases of wills and contracts in the matter of their construction and the admissibility of extrinsic evidence to aid therein, by reason of the fact that the will is the language of the testator, soliloquising, and that the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used, says that on the other hand the language of a contract is the language used by one contracting party to another, "and the words must take their meaning from those things of and concerning which they are used, and those only," in which the author quotes from Blackburn's Contract of Sale, as quoted from Blackburn, J., in a case mentioned. On the same page, viz., 132, of Mr. Beal's work, further quotations are given from Lord Blackburn as follows: "In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words:" *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, at p. 764.

Further, Brett, L.J., in *Lewis v. Great Western Railway Co.* (1877), 3 Q.B.D. 195, at p. 208, uses the following language as quoted by Mr. Beal at p. 132 of his volume: "Now I apprehend that, in order to construe a written document, the Court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the Court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which must be taken to have been known by both parties to the contract."

Summarising the results of opinions expressed and to some of which reference has been made above, it is, I think, clear that where the contract between the parties is in writing we are bound in the first instance to find, if possible, the intention of the parties and the full terms of their contract within the four corners of the written document; and that it is only in the case where we cannot

Grant, J.

1925.

REDEMPTORY
AND
MIDLAND
LOAN AND
SAVINGS CO.

Grant, J. do so that we are entitled to avail ourselves of extrinsic evidence
1925. to assist in the construction of the document. The modifications
of the rule permitting evidence of customs, usages, etc., apply to
certain special cases only, and do not affect the case which we have
to consider.

REDEMPSEY
AND
MIDLAND
LOAN AND
SAVINGS CO.

Dealing then with the mortgage itself, I find that, as previously quoted, the mortgage makes provision for payment by the mortgagor of certain quarterly instalments on account of principal; but, in so far as my reading of the mortgage has disclosed, there is not at any place in the mortgage, whether in the printed form or elsewhere, any language clearly or definitely forbidding payment by the mortgagor beyond or in addition to the quarterly payments of \$100 each. That provision is compulsory upon the mortgagor and is clearly inserted for the benefit and protection of the mortgagee. If I have read the mortgage correctly, it does not contain any stipulation or condition to which the paragraph which we are endeavouring to construe would be repugnant if it were so construed as to permit the mortgagor to pay a greater amount on account of the principal, or indeed the whole of the principal, on any day appointed for the payment of an instalment.

Before dealing further with the suggested interpretations of the paragraph as put forward by counsel, I should state my view of the contention of Mr. McLaughlin that letters written in 1924 and 1925 by the mortgagor should be read as shewing the mortgagor's understanding of the terms of his contract with the mortgagee. If the arrangement or agreement between the parties had been by word of mouth only, then I would think that there was a dispute between the parties as to the terms of their arrangement, and a letter written by one of them, or even a verbal statement made by him, might be admissible and entitled to a good deal of weight as constituting an admission on his part. But, as I understand the law, the case is very different where the parties have entered into a contract in writing in which all the terms of their agreement have been embodied. In such a case I do not think that one of the parties is bound by an opinion which he may express as to the interpretation of that contract, or as to his rights under it, unless there is something which creates an estoppel. There was clearly no estoppel in the letters written by the mortgagor in 1924 and 1925, and I am satisfied that we are not entitled to interpret the language of this mortgage in the light or with the assistance of a letter or letters written by one of the parties to it two years or more afterward.

The rule bearing upon this feature of the matter is cited by Lindley, M.R., in the case of *Lord Hastings v. North Eastern Rail-*

way Co., [1899] 1 Ch. 656, at p. 663, where the Master of the Rolls states in substance that unless in the case of an ancient document "the rights of the parties must be decided now as the court would have decided them as soon as the agreement became binding and before the parties had shewn by their conduct how they understood it." I am therefore of opinion that the letters written by the mortgagor in 1924 and 1925 are not admissible as evidence to aid in the construction of the paragraph in question.

This troublesome paragraph, being part of the mortgage-deed as executed by the mortgagor, must be given a sensible construction or interpretation if it be possible so to do. We are under obligation to give the language a meaning if the words are capable of being intelligently understood, even though the grammatical construction be faulty and the language inapt to express the meaning.

Notwithstanding the careful argument presented by Mr. McLaughlin for the mortgagee in support of the construction which he desired should be placed upon the paragraph, in my opinion such construction would result in the paragraph's having no meaning whatever. The purpose and intention of the paragraph, read and understood according to the ordinary meaning of the words used, clearly is that the mortgagor was to have a privilege of paying a greater sum on account of the principal without extra charge for such privilege. The insertion of the word "no" in the space, apart from its resulting in very poor English, would make the paragraph self-contradictory, and I am forced to the conclusion that, as the paragraph was not stricken out altogether but was left in the mortgage, and as it must be given some meaning if at all capable of it, it is impossible to insert the word "no" as urged by Mr. McLaughlin, or to give it the negative and self-contradictory interpretation for which he contends.

This is not an application by the mortgagee to obtain rectification of the mortgage by the striking out of the paragraph. The Court is bound to interpret the document as it stands, and the conclusion which I have reached, not without hesitancy, is that the paragraph is to be read as conferring upon the mortgagor the privilege of paying a greater sum on account of principal; and, as the mortgagee, whose form of mortgage was used and whose solicitor prepared such mortgage (because undoubtedly in drawing the mortgage the solicitor acted for the mortgagee), has not stricken out the paragraph and has not limited the "greater sum on account of principal" which the mortgagor is privileged to pay, the Court is not justified in placing any limit upon such amount. The result,

Grant, J.

1925.

REDEMPTSEY
AND
MIDLAND
LOAN AND
SAVINGS CO.

Grant, J. therefore, must be that the mortgagor is privileged to pay any greater sum on account of principal on any day appointed for payment of any instalment of principal without any extra charge for the privilege, with the consequence as to the cessation of interest upon the amount paid provided for in the latter portion of the paragraph in question.

My answer to the question submitted for the opinion of the Court as set out in the originating notice would be in the affirmative.

As the question is one upon which there was undoubtedly room for difference of opinion, and appears to have been a question not already settled by authority, I think it is not a case for costs.

[KELLY, J.]

RE GIFFEN.

1925.

Oct. 14.

Deed—Delivery—Whether in Escrow—Land Conveyed at Request of Purchaser to himself and Wife as Joint Tenants—Death of Purchaser before Full Payment of Purchase-price—Agreement—Covenant to Pay Purchase-money—Gift—Presumption—Right of Widow as Survivor—Payment of Balance of Price out of Estate of Husband.

L. as vendor and G. as purchaser on the 2nd May, 1925, made an agreement, which was reduced to writing, for the sale and purchase of land. The agreement was executed in the office of a solicitor who acted for both parties; and immediately after the execution L. instructed the solicitor to prepare the deed; G. then instructed the solicitor in doing so to make G. and his wife the grantees as joint tenants; the deed was prepared in that way and was executed by L. and his wife; and both L. and G. instructed the solicitor not to register the deed at once but to hold it until the portion of the purchase-price not paid at the time should be paid in accordance with the agreement, and upon payment thereof to register the deed. The solicitor retained the deed; G. entered into possession of part of the land, and was in possession at the time of his death, which occurred on the 16th May. No further payment was made:—

Held, that there was a sufficient delivery of the deed, and that the arrangement that the solicitor should hold the deed pending payment was a distinct and separate arrangement in the nature of a deposit with or retention by him of the deed as security for the payment; and the widow of G., as survivor, was entitled to the land; but, even if delivery was not made on the 2nd May, the executors of G. were not, in the circumstances, entitled.

In the agreement, G. covenanted to pay the purchase-money; the covenant had not been released; and L. was entitled to enforce performance of it.

There was also a presumption of a gift by G. to his wife, arising from the relationship.

The result was that a joint estate was created, which, on the death of G., devolved by survivorship upon his widow, and that the unpaid portion of the purchase-money was payable by the estate of G., thus enuring to the benefit of his widow. 1925.
RE GIFFEN.

Drew v. Martin (1864), 2 H. & M. 130, referred to.

Discussion of the essentials of a valid delivery in law and what constitutes an escrow.

MOTION by the executors of the will of William Giffen, deceased, for an order determining questions arising as to the effect of a deed whereby certain lands were conveyed to the deceased.

September 21. The motion was heard by KELLY, J., in the Weekly Court, Toronto.

H. S. White, K.C., for the applicants.

R. W. Lent, for Bella M. Giffen, widow of the testator, and for Francis A. Lamphier, the vendor.

October 14. KELLY, J.:—On the 2nd May, 1925, Francis A. Lamphier, as vendor, and William Giffen (the testator), as purchaser, entered into a written agreement under seal for the sale and purchase of certain farm lands in the county of Peel, at the price of \$14,000, \$4,946.10 of which was represented by a mortgage held by the purchaser against the property; \$2,000 of the balance was made payable in cash as a deposit; and the balance, subject to adjustments, payable on the 1st July, 1925. The agreement provided for the vendor retaining possession of the house and a small portion of the lands until the 1st October, 1925, and for the purchaser obtaining possession of the remainder of the farm immediately.

The agreement was executed in the office of Messrs. Davis & Lent, solicitors, Mr. Lent then acting for both parties to the transaction. In his affidavit (part of the material upon this motion) he says, and it is not contradicted, that immediately after the agreement was executed the vendor instructed him to prepare the deed; that the purchaser, "after having explained to him the import of a joint tenancy deed, verbally instructed me," in the presence of the vendor and his wife, to prepare the deed to himself, William Giffen, and his wife, Bella May Giffen, as joint tenants; that the deed was then prepared according to these instructions and was executed by the vendor and his wife, in the presence of the purchaser, William Giffen; that the vendor then instructed him (Mr. Lent) to register the deed; but, on it being explained to both parties that the vendor would have no protection or assurance that the balance (amounting to over \$7,000) of the

Kelly, J. purchase-price would be paid if the deed was registered immediately, both parties instructed him to hold the deed in his possession until the balance of the purchase-price was paid, and upon payment thereof to register it.

1925.

RE GIFFEN.

William Giffen entered into possession of part of the lands and was in possession thereof at the time of his death, which occurred on the 16th May. No further payment was made on the purchase-price prior to the death, nor has anything been paid since. On or about the 2nd July the solicitors for the executors of William Giffen tendered to the solicitors for the vendor for execution a form of conveyance to them, but execution thereof was refused because of the prior conveyance and of the claim of the testator's widow, that she, as survivor, is entitled to the lands under the conveyance of the 2nd May. So far as shewn, she was not present at the time of the transaction of the 2nd May.

The present application is for a declaration as to whether at the time of testator's death the lands were vested in him solely as and for an equitable interest, or were vested in him and his wife as joint tenants, and whether the estate of the deceased is bound, for the benefit of the widow, to pay the balance of the purchase-money owing to the vendor.

The case is an unusual one. The argument proceeded mainly upon the question whether there was delivery in law of the conveyance of the 2nd May, 1925. Such delivery is essential to the completion of a deed; and nice questions arise at times as to whether in a given set of circumstances such delivery has been effected. The instruction to the solicitor by both vendor and purchaser together was to hold the deed in his possession until the balance of purchase-money was paid, and upon payment thereof to him (the solicitor) to register it. The question is, therefore, between two alternative propositions: first, whether in what happened delivery was not intended or effected; or, second, whether there was really a delivery with an independent or separate agreement or understanding that the solicitor should be entrusted with the custody of the deed to hold as security against possible loss to the vendor through failure of the purchaser to pay the balance of the purchase-money, which, though not bound by the contract to pay before the 1st July, the purchaser, at the time and in the vendor's presence, told the solicitor he might pay in a week or so. Had Giffen after that time proposed to the vendor to cancel or alter the deed and substitute a new or altered deed substituting another grantee for and in the place of Bella M. Giffen, it is very questionable if the vendor would have been justified in acceding to it.

On the material, somewhat meagre as it is, I favour the view that there was a sufficient delivery, and that the arrangement for the solicitor holding the deed pending payment was a distinct and separate arrangement in the nature of a deposit with or retention by him of the deed as security for the payment, and that the claim now made by Mrs. Giffen is maintainable. But, even if delivery was not then complete, the executors' claim to the property on behalf of the estate is not, in the circumstances which have arisen, sustainable.

Kelly, J.

1925.

RE GIFFEN.

Discussing the essentials of a valid delivery in law and what constitutes an escrow, Sheppard's Touchstone, pp. 58, 59, lays this down: "The delivery of a deed as an escrow is said to be where one doth make and seal a deed, and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made, to take effect as his deed. . . . If when I shall deliver the deed to the stranger, I shall use these or the like words: I deliver this to you as my deed, and that you shall deliver it to the party upon certain conditions; or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London; in these cases the deed doth take effect presently, and the party is not bound to perform any of the conditions. So it must be delivered to a stranger. . . . Where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed, than if I had made it, and laid it by me, and not delivered it at all; and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, nor will it do him any good. But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediately to the party to whom it is made, and no act of God or man can hinder or prevent this effect then, if the party that doth make it be not at the time of making thereof disabled to make it. He, therefore, that is trusted with the keeping and delivery of such a writing, ought not to deliver it before the conditions be performed; and when the conditions be performed he ought not to keep it; but to deliver it to the party. For it may be made a question, whether the deed be perfect, before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case" (referring to *Perryman's Case* (1599), reported in Coke's Reports, vol. 3, part V. 84a), "that if either of the parties to the deed die before the conditions be performed, and the conditions be after performed, that the deed is good: for

Kelly, J. there was *traditio inchoata* in the lifetime of the parties; and
 1925. *postea consummata existens* by the performance of the conditions,
 RE GIFFEN. it taketh its effect by the first delivery, without any new or second
 delivery; and a second delivery is but the execution and consum-
 mation of the first delivery."

In the agreement of the 2nd May, the purchaser, Giffen, covenanted to pay the purchase-money; the covenant has not been released; and the vendor is entitled to enforce performance of it to realise the unpaid purchase-money. This is a circumstance of great importance, both from the effect it has of bringing about a completion of delivery in law of the deed—if delivery be not yet complete—and indicating the source from which the balance of purchase-money should eventually come.

The subject was dealt with in the case of *Drew v. Martin* (1864), 2 H. & M. 130, in a judgment of Vice-Chancellor Sir W. Page Wood. From the reasons for judgment I extract these facts: The property in dispute was purchased by the testator in the names of himself and his wife, the agreement being meant to be a joint purchase by the husband and wife, some part of the purchase-money still remaining unpaid when it came before the Court. The learned Vice-Chancellor said that the matter resting in contract the question was what should be done, and he proceeded: "To this extent the authorities, which are numerous and of early date, are quite conclusive that a purchase by a husband in the names of himself and wife is held to operate for the benefit of the wife surviving. If therefore the conveyance had been completed, the widow should be entitled to the land. Her position in fact is exactly the same as that of a child in whose name a purchase has been made. . . . The other point raised in the argument, as to how far the wife, as a volunteer, would be entitled to have the contract completed and the money paid out of the husband's personal estate, did not appear to me to involve any difficulty. Although the wife, being a mere volunteer, could not compel specific performance, still the vendors could enforce payment from the husband's estate, and when they had done so the conveyance would have to be made to the wife surviving. The case has some analogy to *Gregory v. Williams* (1817), 3 Mer. 582, *Davenport v. Bishopp* (1843), 2 Y. & C. Ch. 451, and, on appeal (1845), 1 Phil. 698, and that class of authorities, wherein the benefit of a covenant when enforced by others has been held to enure for a volunteer." The Vice-Chancellor's view of the situation was that it was not the case of the volunteer enforcing the contract, but the vendor entitled to enforce, and the volunteer thus taking the benefit. He

refers to the old case of *Redington v. Redington* (1794), 3 Ridg. P.C. 106, the principle of which seemed to him quite sound, where a father purchased property in the name of one of his sons, and before the purchase-money had been fully paid desired to transfer the benefit to another son; and he was held not entitled to do so. The judgment of Lord Clare contains this (p. 201): "One objection had nearly escaped my memory, and that is, that by this decree the executor of old Thomas Redington is directed to make good, out of his personal estate, any balance which may appear upon the account to remain unpaid of the original purchase of Reyhill. The ground upon which I made that a part of the decree simply was, that by the agreement of old Thomas to make this purchase for his son Michael, this balance unpaid is in Equity as much a debt of his, as any other debt of the same nature, and I conceive that his personal estate must be subject to it."

Kelly, J.
1925.
RE GIFFEN.

Then there is the further circumstance arising from the relationship between the party making the purchase and paying or agreeing to pay the purchase-money and the party in whose name the purchase or transfer is taken. If the party in whose name the purchase is taken is not the wife, child or adopted child of the party making the purchase, *prima facie* no presumption arises of a gift, but there is, in the absence of evidence to the contrary, a resulting trust for the person paying; but where the person in whose name the purchase or transfer is taken is the wife, child or adopted child of the one paying the purchase-money or making the transfer, there is then a presumption that a gift was intended. Moreover, when a husband invests money in the joint names of himself and his wife, it is presumed that the survivor is intended to have the investment: Halsbury's Laws of England, vol. 15, pp. 414 and 415, paras. 823 and 824; and see the cases cited thereunder.

Paragraph 826 of the same volume of Halsbury, p. 416, thus summarises the situation where a purchase in the name of a wife or child is incomplete on the death of a testator: "If the purchase in the name of the wife, or child, is incomplete at the death of the husband, or father, the wife or child can insist on the completion of the purchase in the wife's, or the child's, name, and payment of the balance of the purchase-money out of the husband's, or father's, estate."

The combined effect of these propositions of law, applied to the facts and circumstances of this case, is, in my opinion, that a joint estate was created, which, on the death of the husband, devolved by survivorship upon his widow, and that the unpaid portion of the purchase-money is payable by the estate of the deceased, thus enuring to the benefit of the widow.

Kelly, J.

1925.

RE GIFFEN.

This is subject, however, to possible rights of creditors depending on the condition of the estate as to solvency. This question was not raised on the motion, to which the creditors were not parties, and therefore as to their rights, if any, I decide nothing.

It is not unreasonable, in view of the character of the case, that the costs of all parties should be paid out of the estate of William Giffen.

[IN BANKRUPTCY.]

RE STONE.

1925.

Oct. 15.

Bankruptcy—Receiving Order—Application for, by Sole Creditor—Discretion to Refuse—Bankruptcy Act, sec. 4(6)—“Sufficient Cause”—No Advantage Accruing to Creditors—Judgment Obtained against Debtor and Execution in Hands of Sheriff—Property of Debtor, Present and Future, Exigible—Married Woman not Carrying on Trade or Business—Secs. 2(o), (v), 8(1), and 75 of Act.

The trustee of a bankrupt estate recovered, on behalf of the estate, a judgment for the payment of money against the wife of the debtor and placed an execution in the hands of the sheriff, who made a return of *nulla bona*. The trustee then applied for a receiving order against the married woman. It appeared that she had no other creditors and that she had not carried on any trade or business since 1923. The husband's bankruptcy was declared in 1924, and the application was made in 1925. The only property owned by the married woman was an equity of redemption in land:—

Held, that, the object of the Bankruptcy Act being to secure to creditors an equitable distribution of the debtor's assets, and the Court having power, under subsec. 6 of sec. 4, to refuse to make a receiving order if of opinion that for “sufficient cause no order ought to be made,” the application should be refused.

No advantage would be gained, and great expense would be incurred, if a receiving order in bankruptcy were made—the debtor's property was already subject to the trustee's execution, and he had the right to examine her as a judgment debtor and also to examine any transferee from her.

Neither the fact that a debtor has only one creditor nor the fact that he has no assets for distribution is a sufficient reason for refusing to make a receiving order: the debtor may acquire property before obtaining a discharge; but, if the debtor did so, the property so acquired would be subject to the trustee's execution.

The effect of sec. 75 of the Act is that it is only where a married woman carries on a business or trade that she is subject to the Act.

In re Gardiner (1887), 20 Q.B.D. 249, 58 L.T.R. 119, followed.

Section 2, clauses (o) and (v), and sec. 8(1) of the Act must be read in connection with sec. 75.

PETITION by the trustee of the bankrupt estate of S. Stone, against Ida Stone, a judgment debtor of that estate, for a receiving order.

The petition was heard by FISHER, J.

S. J. Birnbaum, for the applicant.

L. N. Sukloff, for Ida Stone.

1925.

RE STONE.

October 15. FISHER, J.:—Counsel for the judgment debtor admitted that there was owing on the judgment upwards of \$500, and that acts of bankruptcy had been committed on her part.

The plain and uncontradicted facts in this case are: that Ida Stone, in conjunction with her father in his business, for some years, bought and sold chattel property and acquired considerable money of her own; that in 1923 she invested part of this money in a delicatessen business with her husband, and together they carried on that business for a period of about 3 months; that they then sold the business; that since 1923 she has not been engaged in business either alone or with her husband; that with part of the purchase-money received from the sale of the delicatessen business she made a loan to her husband; that a short time before her husband's bankruptcy, in 1924, the husband repaid her the amount of the loan, being \$803; that the trustee of the husband's estate made an application to have that payment declared a fraudulent one as against the creditors of the husband, and judgment was given in favour of the trustee; that an execution was placed in the hands of the Sheriff of Toronto, and he made a *nulla bona* return thereon; that there are no other creditors, excepting the trustee; and that the only property owned by the debtor, Ida Stone, is an equity in some store-property.

On these facts the Court is asked to grant a receiving order.

Two objections are made to the petition: (1) that the debtor is a married woman and does not carry on a trade or business, and is therefore immune from the Bankruptcy Act, under sec. 75; and (2) that the Court should not, in the exercise of its discretion, make a receiving order, because there are no other creditors, and the trustee now has all the remedies for realising on any property owned by the debtor for the benefit of the husband's creditors.

On the oral evidence, I hold that the debtor did not at the time the petition was presented, nor has she since 1923, carried on any trade or business, and that the loan of \$803 was the debtor's own personal property; that all debts of the delicatessen business carried on by her in 1923 were paid, and the loan has no connection whatever with that business; but, even if she could be held to be a trader, I would not in this case feel inclined to exercise my discretion in favour of the petition, for the following reasons: the debtor, or any transferee of the debtor, may be examined under

Fisher, J. oath and full disclosure had of any property belonging to the
1925. debtor or in which she has had any interest. If the debtor, or any
RE STONE. transferee, refuses to make full and honest disclosure on examination, he or she may be proceeded against.

In these circumstances, what possible advantage is there in granting a receiving order in bankruptcy, with all the incidental expense connected therewith ?

I am of opinion that the Bankruptcy Act should not be used in a case such as this, when the trustee has now ample power to realise on his judgment, if he can do so. If a receiving order were granted, what could the trustee do thereafter that he cannot do now ? What possible use is there of vesting in the trustee under a receiving order property which is already subject to his execution ? If a receiving order be granted, a custodian must be appointed, publication must take place in the Gazette, a meeting of creditors must be called (and there are none) and inspectors appointed, all of which seems a useless expense, when the only property which it is suggested that the debtor owns is that which, as I have said, is bound by the petitioner's execution and may be realised thereunder.

The object of the Bankruptcy Act is to secure to creditors an equitable distribution of the debtor's assets. The Court has power, on an application for a receiving order, to refuse the same if it is of the opinion that for "sufficient cause no order ought to be made:" see subsec. 6 of sec. 4 of the Bankruptcy Act.

Of course the mere fact that the debtor has only one creditor is not a sufficient reason for refusing to make a receiving order: see *Re Maguire* (1921), 51 O.L.R. 63, 2 C.B.R. 94; *Ex p. Dixon* (1884), 13 Q.B.D. 118; and *Ex p. Oram* (1885), 15 Q.B.D. 399. Nor is the fact that there may be no assets for distribution amongst the creditors a sufficient cause for refusing a receiving order, because the debtor may afterwards acquire property before obtaining a discharge; but in this case there is little probability of the debtor having further assets; and, in any event, as I have pointed out, the petitioning creditor has a judgment against the debtor which can be kept alive, and if any future property is acquired the execution in the Sheriff's office will attach to that property, and if property can be found it may be sold in execution for the satisfaction of the petitioning creditor's debt: see *In re Betts*, [1897] 1 Q.B. 50, and *In re Somers* (1897), 4 Mans. 227.

There remains the question whether or not the debtor, not being a trader, is immune from bankruptcy proceedings.

Section 75 of the Act reads as follows:—

"Every married woman who carries on a trade or business,

whether separately from her husband or not, shall be subject to the provisions of this Act as if she were a *feme sole*, and for all the purposes of this Act any judgment or order obtained against her, whether or not expressed to be payable out of her separate property, shall have effect as though she were personally bound to pay the judgment debt or sum ordered to be paid."

It seems to me that Parliament in enacting this section very plainly intended that it was only in a case where a married woman carried on business or trade that she was to be subject to the Bankruptcy Act. It expressly enacts that if a married woman carries on a trade or business she is to be subject to the provisions of the Bankruptcy Act; and, in the absence of any provision to the contrary, the necessary inference is that, if she does not carry on a trade or business, she is not to be subject to the provisions of this Act. If Parliament did not so intend, what possible object was there in enacting this section? There are no decisions under this section, but under a similar section in the English Act (125) it is held that unless a married woman is engaged in a trade or business she is not subject to the provisions of the Act: see *In re Gardiner* (1887), 20 Q.B.D. 249, 58 L.T.R. 119.

Counsel for the trustee argues that under the interpretation section (2 (o)) the word "debtor" includes "any person," and therefore a "married woman;" and that, as sec. 2 (v) provides that "'judgment' or 'execution' or 'attachment' shall have operation as if by law the liability of married women thereon and thereunder were personal as well as proprietary," it has the effect of making married women personally liable on all judgments recovered against them; and the judgment in this case, if it had been in the proprietary form, would by virtue of this section have to be regarded as if it were a personal one; and therefore the objection that there is no personal liability on the judgment, which is one reason for holding that married women cannot be proceeded against in bankruptcy, is removed: see *In re Gardiner. supra*; and in the case of a married woman trading or carrying on business that is no doubt so.

He also contended that, as sec. 8(1) exempts only wage-earners, farmers, and tillers of the soil, if it was intended to exempt a married woman this section would have so declared. But it seems to me that, although "any person" may *prima facie* include married women as well as men, yet these sections of the Act must be read in connection with sec. 75; and, if a person against whom there is a judgment (even though it be a final judgment) happens to be a married woman you cannot invoke the provisions

Fisher, J.

1925.

RE STONE.

Fisher, J. of the Bankruptcy Act against her unless she carries on a trade or business. The words "any person" in sec. 2 (o) are not equivalent to "every person"—e.g., they do not I think, include infants. See *In re Beauchamp Brothers*, [1894] 1 Q.B. 1. And what is there said in regard to infants applies, I think, also to married woman who do not carry on any trade or business.

The petition will be dismissed with costs.

[APPELLATE DIVISION.]

1925.

Oct. 16.

RE TOWNSHIP OF YORK AND TOWNSHIP OF NORTH YORK.

Municipal Corporations—Division of Township—Cost of Local Improvements—Matters in Dispute between New Townships—Determination by Ontario Railway and Municipal Board—Members of Board Acting as Arbitrators—Special Act 12 & 13 Geo. V. ch. 140, sec. 4(1) (a), (2)—Right to Submit Questions to Court—Questions of Law—Opinion of Board—Municipal Act—Ontario Railway and Municipal Board Act.

By "An Act to incorporate a Part of the Township of York as the Township of North York," 1922, 12 & 13 Geo. V. ch. 140 (Ont.), sec. 4(1) (a), all matters in dispute between the township corporations shall be determined by the Ontario Railway and Municipal Board, which (subsec. 2 of sec. 4) "shall be deemed to be the Board of Arbitrators appointed under the Municipal Act, and the award of the Board shall be final and conclusive and without appeal:"—

Held, that it is as arbitrators appointed under the Municipal Act and not as the Railway and Municipal Board that power is given to the Board to make an award; and the Board, acting as arbitrators, have no right to submit questions for the opinion of the Court except upon matters of law.

Questions submitted by the Board as arbitrators, before making their award, not being questions of law, were not answered.

Per RIDDELL, J.A.:—If the Board were not to be considered simply a board of arbitrators and were considered to have in this matter all the powers given by the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, it would be entitled to submit to the Court questions which in its opinion were questions of law, whether the Court was or was not of the same opinion.

The questions submitted by the Board—which related to the incidence of the cost of local improvement works commenced before the setting apart of North York as a separate township—considered.

CASE stated by the Ontario Railway and Municipal Board for the opinion of the Court in regard to the liability respectively of the two township corporations for certain local improvements commenced before the division of the old Township of York into two townships—York and North York. See "An Act to incorporate a Part of the Township of York as the Township of North York," 1922, 12 & 13 Geo. V. ch. 140.

The questions submitted by the Board are set out in the judgment of RIDDELL, J., *infra*. App. Div. 1925.

September 30. The case was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

A. C. McMaster, K.C., and W. C. Parrott, for North York, argued that the proper principle to be applied by the Ontario Railway and Municipal Board was that indicated in *In re United Counties of Northumberland and Durham and Town of Cobourg* (1860), 20 U.C.R. 283, namely, that each township should pay for the work and improvements wholly within its own limits, and that adoption by the Legislature of this principle in respect to works in course of construction at the time of the creation of the new municipality was some indication that this was the proper principle to be applied in other cases. As to whether the questions were questions of law proper to be submitted for the opinion of the Court, he referred to sec. 46 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, and argued that if, in the opinion of the Board, they were questions of law, it was immaterial whether the opinion was correct or not.

J. H. Spence, K.C., and H. A. Hall, for York, contended that North York should pay in the ratio of the assessments for the year 1922, and referred to *Re City of Ottawa and Township of Nepean* (1910), 2 O.W.N. 480; but, in any event, the members of the Board were in this case acting as special arbitrators named in the statute 12 & 13 Geo. V. ch. 140, sec. 4, under which separation of the townships was carried out, and had not the right to submit the questions.

October 16. LATCHFORD, C.J.:—This matter comes before the Court upon a case stated for its opinion by the Ontario Railway and Municipal Board, on the application of both the parties concerned.

Jurisdiction is assumed to have been conferred upon the Board by the special Act (1922) 12 & 13 Geo. V. ch. 140, sec. 4(1)(a), which provides that all matters in dispute between the Townships shall be determined by the Ontario Railway and Municipal Board, which, by subsec. 2 of the same section, shall be deemed to be the Board of Arbitrators appointed by the Municipal Act, and the award of the Board "shall be final and conclusive and without appeal."

It is therefore *quâ* arbitrators appointed under the Municipal Act and not *quâ* the Railway and Municipal Board that power is given to them to make an award.

App. Div.

1925.

RE
TOWNSHIP
OF YORK
AND
TOWNSHIP
OF NORTH
YORK.

Latchford,
C.J.

Acting then not under the powers conferred on the Board as such, but as arbitrators specially appointed under sec. 4 of ch. 140, their powers are such only as are exercisable by an arbitrator or arbitrators acting under the Municipal Act, incorporating, as it does by sec. 333, except where otherwise provided, the Arbitration Act, R.S.O. 1914, ch. 65.

The Board acting as arbitrators have no right to submit a stated case except upon matters of law.

It is not suggested by the Board or by counsel that the questions submitted are matters of law. I therefore think they have been wrongfully submitted, and that they should not be answered.

It is not a case for costs.

MIDDLETON, J.A., agreed with LATCHFORD, C.J.

RIDDELL, J.A.:—The Legislature by the Act (1922) 12 & 13 Geo. V. ch. 140 (Ont.) provided for the division of the Township of York into two townships of the names York and North York—this became effective on the 19th July, 1922. By sec. 4 (1) (a), “All matters in dispute between the two corporations shall be determined by the Ontario Railway and Municipal Board,” and (2) “The said Board for the purposes of this Act shall be deemed to be the Board of Arbitrators appointed under the Municipal Act, and the award of the Board shall be final and conclusive and without appeal.”

The Board met to determine the proportion of local improvement charges payable to the new Township of York by the Township of North York, the old Township of York having before the separation constructed a number of local improvement works, such as pavements, sidewalks, &c.

On the reference the two Townships differed on the principle to be followed — York contending that North York should pay in the ratio of the assessments of the Township for 1922: while North York contended that the Townships should pay each for the work within its limits. Each of these contentions sounds reasonable, according to the point of view.

It appeared “to the Board that the questions so raised are questions of law proper to be submitted for the opinion of the Divisional Court,” and the Board accordingly submitted to the Court the following:—

(1) Whether under the Consolidated Municipal Act, 1922, the corporation's share of the cost of said local improvement works, where the land specially assessed therefor lies wholly in the Town-

of North York, and no more, shall be borne by the Township of North York, and the corporation's share of the cost of the remainder of the said local improvement works, and no more, shall be borne by the Township of York; or

(2) Whether the corporation's share of the cost of all the said local improvement works shall be borne by the Township of York and the Township of North York respectively in the proportion which the total assessed value for the year 1922 of the area which immediately after the severance formed the Township of North York bears to the assessed value for the said year of the proportion of the original Township of York which immediately after the severance formed the Township of York, that is to say, in the proportion of 22.92 per cent. and 77.08 per cent.; or, if not,

(3) What is the proper principle to apply in the apportionment of the corporation's share of the cost of the said local improvement works as between the said Township of York and the said Township of North York?

By the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186, sec. 46, the Board "may . . . state a case in writing for the opinion of a Divisional Court upon any question which, in the opinion of the Board, is a question of law"—that is, it is for the Board to determine without appeal whether any question is a question of law—and if the Board is of opinion that it is a question of law it may submit a case thereon for the opinion of a Divisional Court. When a case has been submitted, sec. 46(2) provides that "The Divisional Court shall hear and determine such special case. . . ." Consequently, whatever the difficulty of the questions submitted, it is our duty to hear and determine them if the Board was, in law, acting as the Board.

Here, however, we are met with the difficulty that the Board "shall be deemed to be the Board of Arbitrators appointed under the Municipal Act." "Deemed" means here "considered," "adjudged," "conclusively treated as being:" *Re Rogers and McFarland* (1909), 19 O.L.R. 622. Consequently the Board is to be considered the Board of Arbitrators which would be appointed under the Consolidated Municipal Act, 1922, secs. 34, 36 (e). It was suggested on the argument that it followed that the Board could have no higher or more extensive powers than a Board constituted under the last-named Act, which are set out in the Arbitration Act, R.S.O. 1914, ch. 65, sec. 10(b), "to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court," which presupposes an award—or sec. 29,

App. Div.

1925.

RE
TOWNSHIP
OF YORK
AND
TOWNSHIP
OF NORTH
YORK.

Riddell, J.A.

App. Div. "An arbitrator . . . may at any stage of the proceedings
 1925. . . . state in the form of a special case for the opinion of
 RE the Court any question of law arising in the course of the refer-
 TOWNSHIP OF YORK ence." In the latter case it is for the Court, not the arbitrator,
 AND to determine whether the question submitted is a question of law.
 TOWNSHIP OF NORTH YORK. The determination of the capacity in which the Board is acting
 rests upon the wording of the legislation. The matter may be put
 Riddell, J.A. in this way:—

(1) By (1922) 12 & 13 Geo. V. ch. 140, sec. 4(1), are brought into operation the provisions of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, secs. 30, 34, 36, by which North York must pay to York "such sum as may be just:" sec. 36(d).

(2) In the absence of special legislation, the matters in dispute, if the corporations cannot agree—as apparently they cannot—"shall be determined by arbitration:" sec. 36(e); and

(3) The Board of Arbitrators is to be formed by each selecting an arbitrator (sec. 335 (1)) (or, in default, the Judge—sec. 336), and these appoint a third (or, in default, the Judge).

What is to be now decided is at what point the special legislation of (1922) 12 & 13 Geo. V. ch. 140 breaks the chain. Does it mean to say to the Township: "The sum to be paid shall not be determined by arbitration at all, but by another method, namely, reference to the Railway and Municipal Board?" Or does it mean to say: "The sum to be paid shall be determined by arbitration, but the Board of Arbitrators shall not be selected in the statutory manner—we determine the constitution of the Board now?"

It seems to me beyond question that what is meant by sec. 4(2) of ch. 140 is that arbitration is still to be the method, but that for all the purposes of the statute the Board shall be and act as a board of arbitrators—in other words, the chain above-mentioned is broken before the third not the second link.

Not only does the wording of the Act require us so to hold: but the fact that otherwise the subsection would be wholly useless helps to the same conclusion.

It is, of course, elementary that special legislation overrides general legislation in case of a conflict—the general maxim is *Generalia specialibus non derogant*—see *Lancashire Asylums Board v. Manchester Corporation*, [1900] 1 Q.B. 458, at p. 470, *per* Smith, L.J.—even where the general legislation is subsequent: *Barker v. Edgar*, [1898] A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the particular subject and made provision for it, and the pre-

sumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: Craies on Statute Law, 3rd ed., p. 317.

Here, where it is specially provided (sec. 4(1)(a)) that all matters in dispute between the two corporations shall be determined by the Railway and Municipal Board, there was no need of going further to enable the Board acting as the Board to perform the functions of a board of arbitrators under the Consolidated Municipal Act, 1922: sec. 4 (2) must have had some purpose, and this purpose must have been to cause the Board not to act as the Board, but as a board of arbitrators. Hence we are to deem, i.e., to adjudge, the Board to be a board of arbitrators—the dispute is to be determined by a board of arbitrators, whose personnel is already fixed expressly or by implication, and not “appointed under the Municipal Act.”

I think, therefore, that the Board thus acting can, before an award, submit only questions of law, and that the questions submitted are not questions of law—consequently the submission is *ultra vires* the Board, and the questions should not be answered.

Should I be wrong in thus considering the Board simply a board of arbitrators, and the holding should be that it has in this matter all the powers given by the statute R.S.O. 1914, ch. 186—then there can be no doubt that it may submit the said questions to us if in its opinion they are questions of law. In coming to a conclusion as to whether the questions are questions of law, it is not subject to our opinion or that of any other tribunal—it has the same right to make mistakes as we have: *In re Long Point Co. v. Anderson* (1891), 18 A.R. 401, at p. 408, *per Osler, J.A.*; *Siddall v. Gibson* (1859), 17 U.C.R. 98; *Re Sutton v. Dineen* (1922), 23 O.W.N. 115, and cases cited.

I take it, too, that the Legislature, which within the ambit of its jurisdiction can do anything not naturally impossible, can make us hear and determine these questions as questions of law although they are not questions of law.

Proceeding in that view, it seems to me impossible to give any answer to the first and second questions, and *lex non cogit ad impossibilia*.

What is to be paid is what is just: The Consolidated Municipal Act, 1922, sec. 36(d).

Abstract and perfect justice need not be looked for—that lives in the realms above: substantial justice is all that any court or any other tribunal can give, and substantial justice is that which

App. Div.

1925.

RE
TOWNSHIP
OF YORK
AND
TOWNSHIP
OF NORTH
YORK.

Riddell, J.A.

App. Div. satisfies the sense of right of a clear-eyed, intelligent, well-in-
 1925. formed, unprejudiced, and honest man. "There is nothing either
 RE good or bad, but thinking makes it so."

TOWNSHIP
 OF YORK
 AND
 TOWNSHIP
 OF NORTH
 YORK.

It has an alluring sound to say that the Townships should pay for the property they keep—but a very slight consideration would convince that this might lead to grave injustice.

Riddell, J.A. A road laid out or improved, a sidewalk made in the southern township, even if solely within the limits of that township, may be the means of improving the northern, increasing the population and business, enhancing the value of property and the amount of the assessment, but of no more or little more utility to the southern township, which will "own" them, than to the rest of his Majesty's subjects. Indeed, the fact may be that works wholly within the southern township may be a distinct detriment to it by taking business or inhabitants to the north.

So, too, it sounds well to say, "Each should pay according to its means." That is broadly, but with many and important exceptions, the theory of municipal and other taxation—however it may seem to penalise industry and thrift. But, again, that rule may work grave injustice. Why should the wealth of one part of the old township pay for improvements which are and can be of little advantage to that part, but which may make wealth in the future for the other ?

The difficulty in that view is increased by the fact that the payments on the debts are spread over some years to come, but the proposition must be fixed now. Why, it may be asked, should the present proportion hold while, in the future, one part increases more rapidly in wealth and population ?

It seems to me that to deal with this matter justly there must be a careful investigation into present and past facts, into the advantage to each Township of each work, etc. In addition to these facts there must be a careful consideration of the advantages reasonably to be anticipated in the future—this may be not much better than a guess, but it is what Judges and juries are doing and must do every day. "Damages are to be assessed once for all" is the standard direction—and it is the duty of Judge and jury to make the best estimate possible under all the circumstances.

I would say to this Board, as every trial Judge has said to a jury: "Determine the facts from the evidence, make the best estimate you can from the evidence of what the future will bring forth; with all the facts actual and anticipated in mind, and

giving each of them such weight as you think they deserve, deal with the matter in dispute honestly and fairly, and arrive at the result which seems to you to be just."

If on making an award the Board is in doubt of its justice, it would seem that before finally bringing the award into effect, it may ask the opinion of the Court under the provisions of the Arbitration Act.

MASTEN, J.A.:—I agree in the result.

App. Div.

1925.

RE
TOWNSHIP
OF YORK
AND
TOWNSHIP
OF NORTH
YORK.

Riddell, J.A.

Questions not answered.

[APPELLATE DIVISION.]

LONDON LOAN AND SAVINGS CO. OF CANADA LTD. v. UNION
INSURANCE CO. OF CANTON LTD.

1925.

Oct. 20.

Insurance (Fire)—Loss Payable to Mortgagees—Policy Made Subject to Provisions of Mortgage Clause—Right of Mortgagees to Maintain Action in their own Name—Proofs of Loss, by whom to be Given—Dispensing with Proofs—Ontario Insurance Act, sec. 199—Change of Ownership—Failure to Notify Insurers—Effect of Mortgage Clause—Policy not Avoided—Damages for Breach of Obligation.

The plaintiffs, mortgagees, brought, in their own name, an action upon a policy of insurance issued by the defendants, whereby they agreed to insure C. against fire, the loss, if any, being made payable to the plaintiffs. A mortgage clause, attached to the policy, provided that the insurance as to the interest of the mortgagees should not be invalidated by any act or neglect of the mortgago or owner of the property insured. Before the happening of the fire which gave rise to the action, C. had sold the property and assigned the policy to T., and T. had resold the property and assigned the policy to S., the consent of the defendants not being obtained:—

Held, that the plaintiffs had a right to maintain, in their own name, an action upon the policy.

Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co. (1901), 3 O.L.R. 127, followed. That was a decision of the Court of Appeal and was binding upon this Court, although the judgment was reversed upon a different point: *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (1903), 33 Can. S.C.R. 94.

If it were otherwise, the Court would not permit the plaintiffs' right to be defeated for this reason, but would add all necessary parties.

2. The policy called for proofs of loss by the person insured. C., having parted with his interest, could not swear to any loss, but proofs of loss, shewing the plaintiffs' claim, were furnished:—

Held, having regard to the mortgage clause, that the policy, which expressly preserved the right of the mortgagees, notwithstanding anything that might be done by the insured, could not be so construed as to render it impossible for the mortgagees to recover because of the action of the insured in parting with the property.

Also, the case fell within sec. 199 of the Ontario Insurance Act, and proofs of loss might be dispensed with.

1925.

LONDON
LOAN AND
SAVINGS
CO. OF
CANADA
LTD.
v.
UNION
INSURANCE
CO. OF
CANTON
LTD.

3. In the mortgage clause there was a stipulation that the mortgagees should at once notify the insurance company of any change of ownership that should come to their knowledge:—

Held, that this was an independent obligation, for breach of which the plaintiffs would be answerable in damages, if the defendants could prove damage, but the breach did not invalidate the policy.

Also, the failure to give notice of the conveyances and to obtain the consent of the defendants thereto was an act or neglect of the mortgagor or owner, which, as expressly provided, would not invalidate the policy.

Judgment of LOGIE, J., 56 O.L.R. 590, affirmed.

An appeal by the defendants from the judgment of LOGIE, J., 56 O.L.R. 590.

April 28 and 29. The appeal was heard by LATCHFORD, C.J., MIDDLETON, J.A., LENNOX, J., and ORDE, J.A.

A. C. Heighington, for the appellants.

R. S. Cassels, K.C., and *G. A. P. Brickenden*, for the plaintiffs, respondents.

October 20. MIDDLETON, J.A.:—An appeal by the defendants from the judgment of Mr. Justice Logie, dated the 11th February, 1925, in favour of the plaintiffs for the recovery of \$2,000 loss under a policy of insurance issued by the defendants, dated the 14th August, 1922.

The facts are sufficiently set forth in the judgment of the learned trial Judge and need not now be mentioned in any great detail. By the policy the company agreed to insure Mr. "F. C. Clarkson, trustee A. L. McCredie," the "loss, if any, payable to the London Loan and Savings Company of Canada Limited, mortgagees," and attached to the policy is a mortgagee clause, fully set out in the judgment in review, providing that the insurance as to the interest of the mortgagees shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured.

Before the happening of the fire giving rise to the claim, Clarkson had sold the property and assigned the policy to one Taylor, and Taylor had resold the property and assigned the policy to one Speiran, the consent of the company not being obtained. It is set up in answer to the plaintiffs' claim that the defendants have no contract of insurance with the plaintiffs and that the policy was voided by the conveyances and assignments; and, further, that the plaintiffs cannot recover in the absence of proofs of loss made by Clarkson, the insured named in the policy. In reply the plaintiffs rely on sec. 199 of the Ontario Insurance Act.

All these defences are, in my view, quite satisfactorily dealt with by the learned trial Judge, and little need be said beyond what is found in his very careful judgment.

Before us, the question mainly pressed was the contention that there was no right in the plaintiffs to maintain an action in their own name upon the policy. This question is, I think, concluded, so far as we are concerned, by the judgment of the Court of Appeal in the case of *Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co.* (1901), 3 O.L.R. 127. True its judgment was reversed in the Supreme Court of Canada, *Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co.* (1903), 33 Can. S.C.R. 94, and in the course of his judgment in that case Mr. Justice Davies expressed doubt as to the accuracy of the law on this question as laid down in the Court below; but, in the view of the Supreme Court, this question did not arise for decision, as that Court was of opinion that the plaintiffs failed for entirely other reasons. Mr. Justice Sedgewick and Mr. Justice Mills concurred with the views of Mr. Justice Davies. The Chief Justice and Mr. Justice Girouard did not discuss the question. The question is clearly left open as far as the Supreme Court is concerned, for Mr. Justice Davies says (p. 110): "It is not necessary on this appeal for us to determine, and we do not determine, whether such a mortgage clause as was inserted in this policy gave the mortgagees such a beneficial right and interest or constituted such a direct contract between the mortgagees and the insurance company as would enable the former to sue in their own name alone and irrespective of Arnott," the mortgagor. The judgment of the Court of Appeal is, as already said, binding upon us.

The matter does not appear to be of great practical moment, for, in my view, the Court would not permit the plaintiffs' right to be defeated for this reason, but would add all necessary parties as plaintiffs if they consented, or as defendants if the consent was refused, so that justice might not be defeated.

The late Chief Justice Armour (3 O.L.R. at p. 137 *et seq.*) upheld the plaintiffs' right to sue, upon two grounds: first, that the effect of the mortgage clause was to make the mortgagees parties to the policy, and thus enable them to maintain the action upon the policy to the extent of the amount due upon the mortgage; secondly, that in any event the effect of the provision by which the loss, if any, was payable to the mortgagees was to give to the mortgagees an equitable lien on the money secured by the policy. This was not only assented to by the insurance company, but it expressly agreed to pay the insur-

App. Div.

1925.

LONDON
LOAN AND
SAVINGS
CO. OF
CANADA
LTD.

v.
UNION
INSURANCE
CO. OF
CANTON
LTD.

Middleton,
J.A.

App. Div. ance money to the mortgagees, upon the happening of a loss, to the
1925. extent of their interest.

LONDON
LOAN AND
SAVINGS
CO. OF
CANADA
LTD.
v.
UNION
INSURANCE
CO. OF
CANTON
LTD.
Middleton,
J.A.

Insurance contracts in this form do not appear to be usual in England, but in the 7th (1923) edition of Bunyon's Law of Fire Insurance the topic is discussed at p. 373, and American cases strongly in the plaintiffs' favour are cited as correctly expounding the law. The American cases are, however, more fully collected in Joyce on Insurance, 2nd ed., vol. 4, para. 2305. These cases almost uniformly uphold the mortgagee's right to sue, sometimes upon the ground that the provision in the contract is a contingent order or assignment of the money should the event happen upon which the insurance money becomes payable; sometimes upon the ground that there is an independent and derivative contract between the insurance company and the mortgagee; sometimes because the insurance when effected by the mortgagor is in truth effected by him as agent for the mortgagee; sometimes because the mortgagor makes the insurance in pursuance of a covenant obliging him to insure for the protection of the mortgagee, and so he holds the policy in some fiduciary capacity for the mortgagee, and the mortgagee may, therefore, assert his right by an action, making the mortgagor a party defendant where this is necessary for the protection of the insurance company.

Welford and Otter-Barry on Fire Insurance, 2nd ed., p. 48 *et seq.*, after shewing that it is competent for the mortgagor to insure his own interest, state that it is equally competent for any person having an insurable interest in the subject-matter to effect insurance which will cover not only his own interest but the interest of all those others, and they illustrate this by the cases of insurance effected by warehousemen and carriers, in reality for the protection of those owning the goods entrusted to the insurer, and make this equally applicable to the case of mortgagor and mortgagee. They refer to the case of *Martineau v. Kitching* (1872), L.R. 7 Q.B. 436, particularly referring to what is there stated by Blackburn, J., at p. 458; see also *Waters v. Monarch Life Assurance Co.* (1856), 5 E. & B. 870; *Ebsworth v. Alliance Marine Insurance Co.* (1873), L.R. 8 C.P. 596; and the Nova Scotia case *Seaman v. West* (1884), 17 N.S.R. 207.

The second point argued before us was the absence of the proofs of loss called for by the contract. The policy apparently calls for proofs of loss by the person insured, i.e., Mr. Clarkson, who had ceased to be the owner at the time of the loss. These, of course, could not be supplied, but proofs of loss shewing the plaintiffs' claim were furnished. It is contended that there can be no recovery, notwithstanding the provisions of the mortgage clause,

owing to the fact that Mr. Clarkson had parted with his interest in the property, and so cannot swear to any loss. Having in view the express provision of the mortgage clause, I do not think it is possible to construe the policy, which expressly preserves the right of the mortgagees, notwithstanding anything that might be done by the insured, so as to render it impossible for the mortgagees to recover by reason of the action of the insured in parting with the property. Beyond this, I think the case falls within the provisions of sec. 199 of the Insurance Act, and proofs of loss may be dispensed with.

The third point was based upon the construction of the mortgage clause itself, which stipulates that "the mortgagees shall at once notify the said company of . . . any change of ownership . . . that shall come to their knowledge . . ." This obligation is coupled with an obligation to notify of any increase of hazard and a provision that the mortgagees shall, on reasonable demand, pay an increased rate, but there is nothing invalidating the policy nor rendering payment of loss conditional upon the observance by the mortgagees of their obligations under the clause in question. I think the learned trial Judge was right in treating this as an independent obligation, for breach of which the mortgagees would be answerable in damages. It is not suggested that the change of ownership in any way prejudiced the insurance company, or that it, in fact, sustained any damage by reason of the failure to give the requisite notice.

It also appears to me that the other provisions of the mortgage clause are sufficient to prevent the operation contended for by the defendants. The failure to give notice of the conveyances and to obtain the consent of the insurance company thereto was an act or neglect of the mortgagor, and it is expressly provided that no act or neglect of the mortgagor shall invalidate the policy. How then should the policy be voided by the mere neglect of the mortgagor to give notice of a change of ownership which did not itself invalidate the policy?

In my view, the appeal fails, and should be dismissed with costs.

LATCHFORD, C.J., and LENNOX, J., agreed with MIDDLETON, J.A.

ORDE, J.A., being absent through illness, took no part in the judgment—counsel agreed to accept the judgment of three of the four Judges who heard the appeal.

Appeal dismissed with costs.

App. Div.

1925.

LONDON
LOAN AND
SAVINGS
CO. OF
CANADA
LTD.

v.
UNION
INSURANCE
CO. OF
CANTON
LTD.

Middleton,
J.A.

[APPELLATE DIVISION.]

1925. TOWNSHIP OF SANDWICH EAST v. UNION NATURAL GAS CO.

Oct. 22.

Constitutional Law—Natural Gas Conservation Acts, 1921 and 1922—Powers of Board of Reference.

The judgment of RIDDELL, J., 56 O.L.R. 399, was affirmed, the Court holding that the powers exercised by the Board of Reference under the Natural Gas Conservation Acts of 1921 and 1922 were not of a judicial nature.

APPEAL by the plaintiffs from the judgment of RIDDELL, J., dated the 13th May, 1925.

Judgment was first delivered by RIDDELL, J., on the 22nd December, 1924. The reasons are reported, 56 O.L.R. 399. At p. 405, *sub fin.*, the learned Judge said that the injunction should be removed and the case retained until further order.

On the 13th May, 1925, the case came on before RIDDELL, J., upon motion for further order, and it was then ordered and adjudged that the action be dismissed with costs. The appeal was from the judgment thus pronounced.

October 21 and 22. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and SMITH, JJ.A.

F. D. Davis, K.C., for the appellants, contended that the Natural Gas Conservation Act, 1921, and the Natural Gas Conservation Act, 1922, are *ultra vires* of the Legislature of the Province of Ontario. He argued that the jurisdiction exercised by the Board of Reference, under the Act of 1922, was a judicial jurisdiction, properly belonging to the Supreme Court of Ontario, and that the Legislature had no power to appoint a judicial body, exercising Supreme Court jurisdiction. He further argued that the passing of the Acts above referred to involved a delegation, by the Legislature, of its power of abrogating contractual rights, and that this power could not be so delegated. The provision in the Act of 1922 regarding the manner of appointment of the Board was an interference with the prerogative of the Lieutenant-Governor. Reference to *Re McLean Gold Mines Ltd. and Attorney-General for Ontario* (1923), 54 O.L.R. 573; *In re Initiative and Referendum Act*, [1919] A.C. 935; *Winnipeg Electric Railway Co. v. City of Winnipeg* (1916), 30 D.L.R. 159; English and Empire Digest, vol. 11, p. 515.

W. N. Tilley, K.C., and *J. G. Kerr*, K.C., for the defendants, respondents, contended that this came within the judgment in

Dominion Sugar Co. v. Northern Pipe Line Co. (1920), 47 O.L.R. 119. They distinguished the *McLean* case (*supra*), and argued that the Board of Reference was not exercising judicial functions but was an administrative body only. The Board was not abrogating contractual rights, so there could be no question of the Legislature delegating its power of abrogation. The Acts of 1921 and 1922 were passed, not with the intention of affecting the rights of parties, but rather in the interest of the public, and they were not *ultra vires* of the Legislature. Reference to *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431; *Wilson v. Esquimalt and Nanaimo Railway Co.*, [1922] 1 A.C. 202.

App. Div.
1925.
TOWNSHIP
OF
SANDWICH
EAST
v.
UNION
NATURAL
GAS CO.

THE COURT, at the conclusion of the argument, dismissed the appeal with costs, being of the opinion that the powers exercised by the Board were not of a judicial nature.

Appeal dismissed.

[ROSE, J.]

MATHEWS V. NATIONAL TRUST CO. LTD.

1925.
Oct. 26.

Husband and Wife—Moneys Deposited by Husband in Banks to Credit of himself and Wife—Joint Tenancy—Right of Wife Surviving—Evidence—Presumption—Whether Rebutted by Facts and Circumstances—Affidavit Made and Cheques Signed by Wife after Death of Husband—Absence of Knowledge or Advice—Costs.

The deposit of money in a bank made by a husband in the name of himself and his wife raises a presumption of an intention to create a joint tenancy with all its incidents, including the incident of beneficial ownership by the survivor.

Re Hodgson (1921), 50 O.L.R. 531, and *Re Reid* (1921), 50 O.L.R. 595, followed.

The presumption may be rebutted by parol evidence adduced in an action brought after the death of the husband; but, in the circumstances of this case, where money belonging to the husband was deposited by him in two banks to the credit of both, and requests to the bank to honour the cheques of both and of the survivor were signed by both, it was *held*, upon a review of all the evidence, that the presumption had not been rebutted, and that the widow as survivor was entitled to the money.

When application was made for letters of administration to the estate of the husband, the widow made an affidavit in which the money on deposit was stated to be part of the estate; and after the defendants had become administrators cheques in their favour for the amounts standing to the credit of the accounts which had been opened in the names of the husband and wife were signed by them and by the widow:—

1925.
MATHEWS
v.
NATIONAL
TRUST
Co. LTD.

Held, that these acts of the widow were of no value as evidence that she believed that the money was not hers—she was not mentally alert had no advice as to her rights or the effect of what she was doing, and merely signed what was put before her.

Consideration of the question of costs.

THE plaintiff, the widow of Augustus Alonzo Mathews, who died on the 28th April, 1923, brought this action against the administrators with the will annexed of her husband's estate, to determine the ownership of two sums of money which, at the time of Mathews's death, were held by banks to the credit of the account of Mathews and the plaintiff jointly—the one sum, \$1,841.20 by the Bank of Montreal and the other, \$4,659.40, by the Bank of Hamilton. The plaintiff claimed in right of survivorship. The defendants contended that the money formed part of Mathews's estate and was subject to the trusts of his will, which, if it governed, gave the income to the plaintiff for life and bestowed the corpus upon others at her death.

The action was tried by ROSE, J., without a jury, at Hamilton.

M. J. O'Reilly, K.C., for the plaintiff.

H. A. Burbidge, for the defendants.

October 26. ROSE, J.:—The accounts with the banks were opened in September, 1921, pursuant to requests addressed to the banks respectively, signed by Mr. and Mrs. Mathews. The request addressed to the Bank of Montreal purports to express an agreement between the two depositors and the bank and an agreement by each depositor with the other that all moneys deposited may be withdrawn by either depositor and that the death of one shall not affect the right of the survivor to withdraw all the money. The request addressed to the Bank of Hamilton does not profess to witness an agreement between the two depositors; but the two join in authorising the bank to honour the cheque of either or of the survivor. There is no statement in either document to the effect that the depositors are joint owners of the money deposited.

The money deposited belonged to Mathews at the time of the deposit; that is to say, Mathews had earned it, and legally it was his, although Mrs. Mathews seems to think that she had some interest in it, inasmuch as she had helped to save it. There is no evidence of any statement made by Mathews at or before the time of the opening of the accounts as to his reason for opening them in the names of himself and his wife; but Mrs. Mathews says that at a later time he said that the money would be hers "when he was through"—"when he had passed out."

The accounts were opened some nineteen months before Mathews's death. Some five months after they had been opened, Mathews became incapacitated through illness to sign cheques. Thereafter such cheques as were drawn against the accounts were signed by Mrs. Mathews—she does not think that she had signed any before. Most of the cheques signed by Mrs. Mathews were for small amounts for housekeeping necessities, and some of them were drawn after Mathews's death but before the defendants had obtained letters of administration. There was, however, one cheque for \$1,000 in favour of Mathews's sister, which cheque Mrs. Mathews thinks she signed at her husband's request—the money being a gift to the sister.

When application was being made for letters of administration Mrs. Mathews made an affidavit in which the money on deposit was stated to be part of the estate; and after the defendants had become administrators cheques in their favour for the amounts standing at the credit of the accounts were signed by them and Mrs. Mathews. But the making of the affidavit and the signing of the cheques are of no great weight as evidence that Mathews was the sole owner of the money; Mrs. Mathews was without any advice as to her rights or as to the effect of what she was doing; she signed what was put before her; and unless it can be assumed that her mind was much more active then than it is now—and there is nothing to justify such an assumption—her acts, which in the case of a well-informed person, mentally alert, would have been important as admissions, are really no evidence at all that she believed that the money was not hers. Having regard to her appearance in the witness-box and to the fact that she was not advised as to her rights, or even, so far as appears, as to the nature or purpose of the documents that she was signing, the documents, in my opinion, can have no such effect as was given to the affidavit in *Daly v. Brown* (1907), 39 Can. S.C.R. 122.

The law applicable to cases such as this has been discussed so fully and so recently—notably in *Re Hodgson* (1921), 50 O.L.R. 531, and *Re Reid* (1921), 50 O.L.R. 595—that no review of the cases is desirable. It suffices to state that the rule as it is to be applied in the circumstances of this case seems to be this:—the transaction itself—the deposit by a husband in the name of himself and his wife—raises a presumption of an intention to create a joint tenancy with all its incidents, including the incident of beneficial ownership by the survivor; so that the question is whether, in the parol evidence as to declarations made by the person who owned the money before it was deposited or as to the circum-

Rose, J.

1925.

MATHEWS
v.
NATIONAL
TRUST
Co. LTD.

Rose, J.
1925.
MATHEWS
v.
NATIONAL
TRUST
CO. LTD.

stances or conduct of the parties or as to admissions made by the claimant or as to other relevant facts, there is sufficient to rebut the presumption, as, for instance, by leading to a finding that the deposit in the two names was merely for the convenience of the owner of the fund—a means of enabling the other person named to withdraw the money for the purposes of the true owner, much as such other person could have done if he had been given a power of attorney.

In such an inquiry as to whether there is anything to rebut the presumption raised by the deposit, a consideration of the form of the document, if any, signed at the time of the deposit may or may not be important. In the present case its importance is not very great, seeing that the requests to open accounts were on printed forms presented by the banks and were not identical, and that the plaintiff's knowledge of the effect of written instruments is apparently slight. However, it may be repeated for what the observation is worth that in each of the documents the right of the survivor of the depositors to withdraw the fund is stated expressly; so that any evidence introduced in support of a contention that the real intent of Mathews was that the fund should continue to be his alone is in reality evidence to contradict a written document, as was pointed out by Middleton, J., in *Re Hodgson*. It may be remarked also that, inasmuch as the documents in this case do evidence the right of the survivor to draw cheques against the account, they are more strongly in favour of the plaintiff's contention than a document such as that used in *Re Hodgson* would have been; but, on the other hand, that the absence of a declaration, such as was contained in the document in *Re Reid*, that the moneys are the joint property of the persons to whose credit they stand, deprives the plaintiff of one argument that might have been open to her if the *Reid* form of document had been used. But, as has been stated already, my opinion is that the case is not to be decided upon any minute examination of the documents, but rather upon the effect of a transaction (in any form) by which the owner of money transfers it to the joint credit of himself and his wife and upon the evidence, if any, which points to the conclusion that his act was not intended to produce its natural result. In the present case, such evidence seems to me to be very weak.

The affidavit and the concurrence in the withdrawal of the money by the trust company have been dealt with, and my opinion that they are to be disregarded has been stated. The signing of the cheque in favour of Mathews's sister is an equivocal act; it

seems to have been at the request of Mathews, but no one says that the gift was not really decided upon by Mr. and Mrs. Mathews. The most that can be said of the signing of the cheque is that it was a recognition by the plaintiff of her husband's right (which was undeniable) to draw upon the fund. It is not equivalent to an admission that the plaintiff had not an equal right. Another bit of evidence is the evidence that, as far as is known, Mrs. Mathews did not sign any cheques while Mathews was in good health; but this is of no value; there is no suggestion but that such money as Mathews drew was applied to the purposes to which both of the spouses desired it to be applied, and no suggestion that Mrs. Mathews wanted money which Mathews did not get for her. In all this evidence there seems to me to be nothing to justify a finding that the transaction was not intended to have its natural effect; nor is there anything in the fact, not hereinbefore mentioned, that Mathews gave \$1,000 to his wife by his will. The testator in *Re Hodgson* gave "all moneys in the bank" to his wife subject to the payment of his debts and funeral and testamentary expenses; but this was not enough to shew that he intended to charge his wife's property—her right as the surviving joint tenant—with his debts so as to put her to her election. In the present case the gift is: "I bequeath the sum of one thousand dollars to my wife Charlotte Mathews absolutely;" and there is nothing to indicate that the testator intended that the money should come from the funds in the banks or thought that it would come from such funds.

My conclusion is that there is no rebuttal of the presumption that the plaintiff became a joint owner with her husband of all moneys deposited in the banks, and, as the survivor, is entitled to the moneys which came to the hands of the defendants. There will be judgment in her favour for \$6,504.60. Under Mathews's will the plaintiff is entitled to the income derived from the residue of the estate. As I understand it, the money in question has been treated as part of that residue, and the plaintiff has had the interest earned by it, so that the judgment ought to be only for the amount withdrawn from the banks by the defendants.

The case does not seem to be one in which there should be an order as to costs. It is unfortunate for the plaintiff that she did not take advice as to her rights and withdraw the money from the banks instead of concurring in its payment to the administrators; but she did concur in what was done, and thereafter the administrators could not very well admit her claim: and it would hardly be right that her costs of establishing her title should be thrown

Rose, J.

1925.

MATHIEWS
v.
NATIONAL
TRUST
CO. LTD.

Rose, J.
 1925.
 MATHEWS
 v.
 NATIONAL
 TRUST
 Co. LTD.

upon the testator's estate. On the other hand, there would be no justification for charging the plaintiff's money with the administrators' costs of the defence of the action. Those costs, probably, will be allowed to them as part of their costs of the administration when they come to pass their accounts; but that is a matter to be determined by the Judge of the Surrogate Court when the administrators and all the beneficiaries are before him.

Perhaps it will not be deemed officious if I express a hope that Mrs. Mathews will be advised to make some settlement of her money which, while leaving the trustees free to make inroads upon the capital for her maintenance if such inroads seem to them to be necessary in her interest, will safeguard her from the consequences of injudicious disbursement—and that she will act upon the advice tendered.

Judgment for the plaintiff.

[IN BANKRUPTCY.]

1925.
 Oct. 27.

RE CLUFF BROTHERS.

Bankruptcy—Adjudication of—Whether Applicable to Partnership as such.

Under the Bankruptcy Act and Rules, an order cannot be made adjudging a partnership or firm as such to be bankrupt—the order must be against the partners individually.

Sections 2(o) and (aa), 4(1), 69, and 70(2) of the Bankruptcy Act, Bankruptcy Rules 94 and 152, and Rule 100 of the Rules of the Supreme Court of Ontario, 1913, considered.

Re John Noble & Son (1924), 5 C.B.R. 147, 27 O.W.N. 107, approved.

APPEAL by a creditor of the firm of Cluff Brothers from an order of the Registrar in Bankruptcy refusing a petition for a receiving order against the firm.

October 20. The appeal was heard by FISHER, J., in Chambers. *T. D. Delamere*, for the petitioner.

October 27. FISHER, J.:—A creditor of the debtor-firm petitioned in Bankruptcy for an order against the firm.

It is admitted that there are two members of the firm, and only one was served with the petition. The Registrar, following his decision in *Re John Noble & Son* (1924), 5 C. B. R. 147, 27 O.W.N. 107, refused to make a receiving order against the firm, *quâ* firm, but made an order against William J. Cluff, the partner served.

Counsel for the appellant contends that he is entitled to a receiving order adjudicating the firm, as well as the individual members thereof, bankrupt.

The sole question for determination on this appeal therefore is, can a firm be adjudged bankrupt?

If it were not for Bankruptcy Rule 94, which reads, "A receiving order against a firm shall operate as a receiving order not only against the firm, but also against each person who at the date of the order is a partner in that firm," and interpretation sec. 2 (aa) of the Bankruptcy Act, which defines "person" as including a "firm" or "partnership," little doubt could be entertained that a firm, *quâ* firm, could not be adjudged bankrupt.

To answer the question submitted, reference must be had to sec. 69, under which a petition may be presented against any one or more partner or partners of a firm without joining all; to sec. 70 (2), which provides that "any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath or otherwise, as the court may direct;" to sec. 2 (o), which defines the meaning of "debtor," and according to which "debtor" includes a member of a firm but not a "firm" or "partnership;" to sec. 4 (1), which reads, "Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy a creditor may present to the court a bankruptcy petition;" and to Bankruptcy Rule 152, which provides that the general practice of the court in civil actions shall in cases not provided for by the Bankruptcy Act, so far as the same are applicable and not inconsistent with the Act or Rules, apply to all proceedings under the Act.

It is obvious that it would be inconsistent with the Bankruptcy Act to attempt to apply Rule 100* of the Rules of the Supreme Court of Ontario, 1913, because the Bankruptcy Act distinctly points out against whom a petition may be filed.

Section 70 (2), in my opinion, does not displace or enlarge sec. 4 and so enable a petition for a receiving order to be presented against others than those coming within the meaning of "debtor" as defined by sec. 4. All that this section (70(2))

* 100. Any two or more persons . . . claiming or being liable as partners, and carrying on business within Ontario, may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action.

Fisher, J.

1925.

RE CLUFF
BROTHERS.

Fisher, J. means is that if, in the administration of a partnership estate by
1925. a trustee, it becomes necessary to institute proceedings in matters
connected with the partnership, those proceedings may be taken
RE CLUFF against the firm, in the name of the firm.
BROTHERS.

It was argued that a "debtor" under sec. 4 (1) is a "person," and a "person" is defined by sec. 2 (aa) as including a "firm" or "partnership," and therefore a receiving order may be made adjudicating a firm or partnership bankrupt; but I am of opinion that the word "person," as defined, cannot be applied so as to enlarge the meaning and scope of sec. 4 (1) any more than sec. 70 (2) can enlarge the specific provisions of sec. 4 (1). I fail to see what object there is in having a receiving order made against a firm, *quâ* firm. If a receiving order is made against one member thereof, the partnership is dissolved—subject to the terms of any subsisting agreement between the partners—and a trustee, after a receiving order has been made, is vested with and entitled to take possession of the books and property and if necessary to examine the bankrupt partner. If the trustee is authorised, he may proceed to have others declared partners of the firm; and, if he should succeed, a petition for a receiving order must be served, and if the court is satisfied, it will declare him a bankrupt. *Cameron v. Stevenson* (1862), 12 U.C.C.P. 389, *In re Squires Bros.* (1922), 3 C.B.R. 191, and *In re Union Fish Co.* (1923), 3 C.B.R. 779, 24 O.W.N. 23, are authorities for the proposition that one partner of a firm cannot without authority of the other make a valid assignment for the general benefit of creditors, upon the principle that the law of partnership is a branch of the law of principal and agent, and that each member is liable for himself on all contracts made in the ordinary course of the partnership business, but the implied authority of one partner to act for the other does not extend or enable him to put the firm in bankruptcy.

Then why should it not be necessary to serve all members of a firm with a petition for a receiving order; why should all partners not have an opportunity to appear and be heard on the return of the petition?

In the present case, counsel admitted that the only other member of the firm is resident in Toronto and could be served, but advanced no reason why he was not served. Whilst this may all be beside the real question for decision on this appeal, at the same time it goes to shew that if all the members of the firm are not served there is nothing in our Act to enable one not served to be heard on the question of his own liability. A firm has not, under the common law or under any statute, the status of a "person."

There are no decisions under our Bankruptcy Act, and there do not appear to be any under the English Act, and that is not to be wondered at because I find in England they have a Rule, No. 288, which reads as follows: "No order of adjudication shall be made against a firm in the firm name, but it shall be made against the partners individually."

This Rule makes it quite plain that under the English Act no order of adjudication can be made against a firm, *quâ* firm, but must be made against the individual members thereof.

Even if Rule 94 impliedly provides that a receiving order may be made against a firm, I fail to see how a Rule which is passed only in aid of and for the purpose of carrying into operation a statute, can go beyond what the statute provides regarding the persons against whom a receiving order may be made.

The meaning that I attach to Rule 94 is that a receiving order shall operate against the firm, provided that all the members are named in and served with the petition for a receiving order, and not otherwise.

I see no reason to disturb the decision of the learned Registrar in *In re John Noble & Son, supra*, and this appeal will therefore be dismissed.

Fisher, J.

1925.

RE CLUFF
BROTHERS.

[APPELLATE DIVISION.]

ALYEA v. CANADIAN NATIONAL RAILWAY CO.

1925.

HODGES v. CANADIAN NATIONAL RAILWAY CO.

Oct. 30.

Railway—Motor Truck Run down by Train at Level Highway Crossing—Injury to Driver and Death of Passenger—Actions for Damages and Compensation—Trial—Findings of Jury—Condition of Crossing—"Whistle did not Blow"—Overwhelming Affirmative Evidence of Credible Witnesses that Whistle Duly Blown—Verdict Set aside and Actions Dismissed.

Two young men who were crossing a railway track in a motor truck at a level highway crossing were run down by a train of the defendants—one was killed and the other (A.) severely injured. In actions brought by the mother of the one who was killed and by the one who was injured and his father to recover damages or compensation, the jury exonerated both men from any negligence, and found that the collision was caused by the negligence of the defendants in "the condition of the crossing"—for which of course the defendants were not responsible—and "that the whistle did not blow for the crossing." The plaintiff A. stated that he did not hear the whistle, and that it was not blown. His evidence was to a slight extent supported by two witnesses who heard a whistle, but thought it was before the whistling post was reached. Against this eleven witnesses for the

1925.
—
ALYEA
v.
CANADIAN
NATIONAL
RAILWAY
Co.

defendants testified that the whistle was duly sounded. None of these witnesses were discredited, and they testified affirmatively to a fact within their own observation:—

Held, that their evidence was to be preferred; and the conclusion must be that upon the entire evidence no honest and intelligent jury, appreciating the evidence, could find in favour of the plaintiffs; and so the Court not only set aside the verdict for the plaintiffs but dismissed the actions instead of directing a new trial.

APPEALS by the defendants from the judgments of ROSE, J., upon the findings of a jury, in favour of the plaintiffs in two actions brought to recover damages arising out of an accident and tried together.

October 14. The appeals were heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

D. L. McCarthy, K.C., and *J. P. Pratt*, for the appellants..

H. S. White, K.C., and *F. L. Webb*, for the plaintiffs, respondents.

October 30. The judgment of the Court was read by MIDDLETON, J.A.:—The accident out of which these actions arose occurred on the 28th January, 1924. The train from Toronto does not stop at Colborne station. On the day in question, two young men, Alyea and Hodges, were crossing the railway track in a motor truck, drawing ice, and were run down by the train. Hodges was killed, and Alyea sustained severe injuries—among other things he suffers from loss of memory. These actions were brought by Alyea and his father to recover damages for the injury he sustained, and by the mother of Hodges to recover compensation for the injury she sustained by her son's death. At the trial the jury found for the plaintiffs, and assessed damages of \$1,100 to the father of Alyea and \$2,500 to him, and awarded the mother of Hodges \$5,000, and judgment was entered accordingly.

Questions were submitted at the trial to the jury in the usual form. The jury has exonerated both Alyea and Hodges from any negligence, and has found that the collision was caused by the negligence of the railway company, such negligence being defined thus, "the condition of the crossing," and "that the whistle did not blow for the east crossing," the east crossing being the place where the collision took place.

"The condition of the crossing" was something for which the railway company was not and could not be responsible. It formed part of a highway over which the railway company had the right to pass. Counsel for the plaintiffs did not attempt to support

the verdict upon this ground, but rested entirely upon the finding of the jury with respect to the whistle.

The plaintiff Alyea states that he did not hear the whistle, and that it was not blown. That he did not hear the whistle in the sense that he did not observe it may be taken for granted, or he would not have driven upon the track. He did not hear the train and all its attendant noise, nor did he see the train, although he says that he looked, until the moment of the impact.

Two witnesses, persons who were standing in the station waiting for the arrival of a truck to remove freight from a car upon a siding, were called for the plaintiffs. These men heard the train coming, and looked out of the station window to see it pass. They heard a whistle—exactly where they cannot say, but think it was before the whistling post was reached.

Against this there stands a solid mass of evidence produced for the defendants shewing that the whistle was duly sounded. These witnesses, eleven in all, consisted of the train-crew, the station officials, railwaymen in charge of a hand-car which had been removed from the track for the purpose of allowing the train to pass, and observers upon the station platform. These are witnesses who testified affirmatively to a fact within their own observation and as to which they cannot be mistaken. It is of course the function of the jury to weigh the evidence, and it is open to it to believe one witness against many, and it is not open to an appellate court to substitute its views as to the credibility of witnesses for the opinion of the jury. If these witnesses had been in any way discredited, it is possible the Court could not interfere and say that the jury was wrong in accepting the oath of one against the oaths of many; but in such cases the Court, I think, is called upon to scrutinise the action of the jury with care to ascertain if in truth it is discharging its quasi judicial function in accordance with the oath taken. In this case there is throughout the evidence no attempt on the part of counsel to discredit these witnesses. They are treated throughout as men honestly endeavouring to tell the truth according to their observation and knowledge, and to the end this was the attitude of counsel for the plaintiffs.

A copy of his address was furnished us in support of the suggestion in the notice of appeal that his address was unfair and inflammatory. I have read the address with care, and find little in it to be objected to, certainly nothing to warrant interference, but I find these statements of importance in considering the main question:—

App. Div.

1925.

ALYEA

v.

CANADIAN
NATIONAL
RAILWAY
Co.Middleton,
J.A.

App. Div.
1925.
ALYEA
v.
CANADIAN
NATIONAL
RAILWAY
Co.
Middleton,
J.A.

The evidence of these witnesses is to be commented upon "not with the idea that a single one of these men is telling an untruth . . . I am not attributing to any of the witnesses who will be commented upon here that they were doing anything except telling the truth as best they know how."

Mr. McCarthy claims that the two witnesses called by the plaintiffs support the defendants' case. I am inclined to the view that their evidence is really colourless. Kelly was asked what attracted his attention to the train, and his answer is:—

"A. Well I heard the whistle blow.

"Q. Where? A. Up the track. We was walking round this waiting room, just walking over to the window to see it come.

"Q. When you say you heard the whistle, where do you say it was blown? A. Well, I could not say. It seemed to be quite a ways away from the station, and I thought by the sound it was up the track some ways.

"Q. Did you hear it more than once? A. No, I just heard the one blow.

"Q. How long was it before you saw the train come past? A. Well I just—it might have been ten, twelve, or fifteen seconds; somewhere in the neighbourhood of there."

The witness then says that on hearing the whistle he went to the window, taking five or six steps, and the train passed in two or three seconds. It had already been shewn by the plaintiffs' counsel from competent witnesses that it took ten seconds to sound the whistle as required by the Railway Act. The evidence of Allen is very similar. On this alone, in view of the volume of evidence shewing that the whistle was duly sounded, it would be impossible to find that it was not. The plaintiff Alyea's own evidence, as I have already suggested, really goes no further than that he did not apprehend the approach of the train, either through the sounding of the whistle, the ringing of the bell, or the general noise and disturbance created by the train, until too late; but there is this further concerning the plaintiff's evidence, that in cases of concussion the victim rarely remembers with accuracy the facts immediately antecedent to the blow, and so he may well be acquitted of any intentional misstatement.

The Supreme Court of Canada has affirmed the principle that where witnesses are credible the evidence of those affirming the existence of a particular thing is to be preferred to the evidence of those asserting its non-existence—for failure to observe, or failure to remember, affords a satisfactory explanation of the discordant statement.

Three other matters lead me to suppose that this is one of the not infrequent cases in which a jury has allowed its judgment to be warped by sympathy. After a very careful charge, the jury at 5 p.m. proceeded to deliberate. At 7 p.m. the jury was recalled, the trial Judge understanding that it desired further instructions. The foreman, after stating that there was no agreement, said: "The question that was troubling us mostly a while ago is, if we give a verdict in favour of the railway company making the railway not guilty, can we allow Mr. Alyea damages as far as his damages go. If we can get over the first question we won't have much trouble." This is the first significant fact. The second is that, after deliberating for almost three hours further, the jury endeavoured to find the railway company responsible for the condition of the municipal highway and to make that one of the causes of the accident. The third circumstance causing one to view the verdict with distrust is the award of damages to the plaintiff Mrs. Hodges. Her son was a youth of seventeen, living at home, and being maintained by his mother. When fourteen he worked for a few weeks in a canning factory, and turned over his wages to his mother, the total being an insignificant amount. Since then he had worked at odd jobs occasionally, and the proceeds went for his own purposes, his clothing, amusements, etc. He paid his mother nothing and she boarded him. The pecuniary loss to the mother by reason of the death of this son could not have been large. The chances were greatly in favour of any contribution being far less than the almost certain outgoing in respect of his future maintenance—yet the jury, properly charged, awarded \$5,000.

In the result, I have arrived at the conclusion that this is one of those rare cases in which we are justified in saying that upon the entire evidence no honest and intelligent jury, appreciating the evidence, could find in favour of the plaintiffs, and so we may not merely set aside the verdict for the plaintiffs, but dismiss the action rather than grant a new trial. There is no suggestion that any further evidence could be forthcoming upon a new trial, and while it might have been impossible to nonsuit at the close of the plaintiffs' case, when the defendants' evidence was heard only one opinion could be entertained as to the answers to be given to the questions submitted.

The appeals should be allowed and the actions dismissed, with costs if asked for.

Appeals allowed.

App. Div.

1925.

ALYEA

v.

CANADIAN
NATIONAL
RAILWAY
Co.

Middleton.
J.A.

[APPELLATE DIVISION.]

1925.

Oct. 30.

MARTELLO V. BARNET.

Mechanics' Liens—Claim of Lien—Validity—Affidavit—Mechanics and Wage-Earners Lien Act, 1923, sec. 18 — Error Cured by sec. 19—Rights of Mortgagee—Priority over Lienholder — Limitation of—Sec. 8(3)—Actual Value of Land—Ascertainment—Finding of Master—Appeal.

The plaintiff's claim for a lien under the Mechanics and Wage-Earners Lien Act, 1923, 13 & 14 Geo. V. ch. 30, arose in respect of two different pieces of work done on two distinct properties, both belonging to the same owner. There was only one claim, the price of the two contracts being added together, and that claim was verified by the plaintiff's affidavit:—

Held, that sec. 18 of the Act does not require two affidavits; but, if two affidavits were necessary, the error was cured by sec. 19.

Under the former law the lienholder was entitled to priority over the mortgagee for the increased selling value of the lands consequent on the lienholder's work: by sec. 8(3) of the Act of 1923, the priority of the mortgagee is maintained, subject to the limitation that, as against the lienholder, the amount secured by the mortgage shall be the actual value of the lands and premises at the time when the first lien arose, or the amount secured by the mortgage, with interest, whichever is the lesser sum.

The lien attaches on the interest of the owner.

The Court refused to interfere with the finding of the Assistant Master that the actual value of the land was \$2,000 less than the aggregate amount of the mortgages against it, and that much less than the price obtained at a subsequent sale not for cash.

AN appeal by the plaintiff, John Martello, against the judgment of an Assistant Master of this Court, dated the 16th June, 1925, disallowing the plaintiff's claim of lien; and also an appeal by the defendants Francis M. Jones and Richard A. Jones, mortgagees of the lands in question, against the finding of the Master that the actual value of the lands when the lien attached was \$17,500.

October 27. The appeals were heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJA.

A. R. Quirk, for the plaintiff.

W. D. McPherson, K.C., for the defendants Francis M. Jones and Richard A. Jones, mortgagees.

October 30. The judgment of the Court was read by MASTEN, J.A.:—The Master has disallowed the lien of the plaintiff on the ground that, while the Act gives the right to include any number of properties in a claim of lien, it does so only on the condition

that where more than one lien is included in one claim, each lien shall be verified by affidavit as provided in sec. 18 of the Mechanics and Wage-Earners Lien Act, 1923, 13 & 14 Geo. V. ch. 30. Section 18 is as follows:—

“18.—(1) A claim for lien may include claims against any number of properties, and any number of persons claiming liens upon the same property may unite therein, but where more than one lien is included in one claim each lien shall be verified by affidavit as provided in section 17. R.S.O. 1914, c. 140, sec. 18.

“(2) The Judge or officer shall have jurisdiction equitably to apportion against the respective properties the amounts included in any claim or claims for liens under subsection 1. New.”

The claim of the appellant Martello arises in respect of two different pieces of work done on two distinct properties, both belonging to the same owner, and his registered lien is as follows:—

“Mechanic’s Lien—Work and Service.

“The Mechanics and Wage-Earners Lien Act.

“Claim for Lien.

“I, John Martello, of the city of Toronto, under the Mechanics and Wage-Earners Lien Act, claim a lien upon the estate of Margaret I. Barnet, Grand Orange Lodge of British America, Francis M. Jones, Huron and Erie Mortgage Corporation, Kathleen M. Scott, and Mary D. W. Hall, of the city of Toronto, in the under-mentioned land, in respect of the following work or service, that is to say: concrete work, including the necessary material, which work or service was (or is to be) done for Margaret I. Barnet, of Toronto, on or before the 26th day of May, 1924.

“The amount claimed as due (or to become due) is \$217.25 and \$30 for this lien.

“The following is a description of the land to be charged: lots 65 and 66 on the west side of Spadina road according to registered plan No. 930.

“Dated at Toronto this 21st day of June, A.D. 1924.

“J. Martello.”

The claim was verified by the affidavit of John Martello, sworn on the 21st June, 1924.

The Assistant Master finds that the lien, though valid in other respects, cannot be supported because, in his view, the statute requires in such a case two separate affidavits.

I do not so construe sec. 18. Here there is only one claim, the price of the two contracts being added together, and that

App. Div.

1925.

MARTELLO

v.

BARNET

Masten,

J.A.

App. Div.

1925.

MARTELLO

v.

BARNET

Masten,

J.A.

claim is verified by the claimant's affidavit. As I read sec. 18, it provides that if there are two or more claimants who join in one lien, each claimant must verify his own claim by an affidavit. Simplicity and absence of needless formalities are, theoretically at least, the key-note of the Mechanics and Wage-Earners Lien Act, and the construction indicated by me tends to simplicity. But, if I am wrong in my interpretation of sec. 18, and if two affidavits are necessary, I am of opinion that under sec. 19* the error is cured and the lien of the plaintiff is not invalidated by reason of a slip on the part of the lienholder in failing to make two affidavits instead of one.

With respect to the cross-appeal of the mortgagee, that is founded on the contention that in determining the value of the lands and premises in question the Master erred in fixing the same at the sum of \$17,500, and that his judgment in that respect was contrary to the law and the evidence and the weight of evidence.

The legal rights of the mortgagees and lienholders are defined by subsec. 3 of sec. 8 of the Act of 1923. That clause reads as follows:—

“Where the land and premises upon or in respect of which any work or service is performed or materials are furnished to be used, is encumbered by a prior mortgage or other charge existing in fact before any lien arises such mortgage or other charge shall have priority over all liens under this Act to the extent of the actual value of such land and premises at the time the first lien arose, such value to be ascertained by the Judge or officer having jurisdiction to try the action by proper evidence to be adduced before him.”

This legislation reverses the situation that heretofore existed. Under the former law the lienholder was entitled to priority over the mortgagee for the increased selling value of the lands consequent on the lienholder's work. By the section above quoted the priority of the mortgagee is maintained, subject to the limitation that, as against the lienholder, the amount secured by the mortgage shall be the actual value of the lands and premises at the time when the first lien arose, or the amount secured by the mortgage, with interest, whichever is the lesser sum.

* 19.—(1) A substantial compliance with sections 17, 18 and 30 shall be sufficient and no lien shall be invalidated by reason of failure to comply with any of the requisites of these sections unless, in the opinion of the Judge or officer who tries an action under this Act, the owner, contractor or sub-contractor, mortgagee or other person, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

The lien attaches on the interest of the owner, that is, in this case, on the equity of redemption of the mortgagor.

In the present case the first lien arose on the 1st October, 1923. The mortgages at that time existing against the property aggregated \$19,500, but the Master has found upon conflicting evidence that the actual value of such land on the 1st October was no more than \$17,500, and we are unable to interfere with his finding of fact in that respect. The fact that the property was sold on the 27th September for \$19,500, and paid for in part by a second mortgage of \$11,500, fails to establish that the actual value of the property was \$19,500. It was of course relevant and proper evidence to adduce, and if it had been a cash price might have been practically conclusive, but we are unable to say from the evidence before us that the Master erred in fixing the actual value at \$17,500.

The result is that the appeal of the plaintiff is allowed, his lien is maintained, and the action referred back to the Assistant Master to be dealt with in all respects *de novo*, having regard to the views expressed in this judgment and the provisions of the statute. The appeal of the mortgagees is dismissed. Costs to the plaintiff in any event.

Judgment accordingly.

[APPELLATE DIVISION.]

HARRIS V. GALLIMORE.

App. Div.

1925.

MARTELLO
v.

BARNET

Masten,
J.A.

1925.

Oct. 30.

Will—Action to Establish, Commenced in Surrogate Court and Removed into Supreme Court—Declaration of Invalidity of Will—Jurisdiction of Supreme Court—Surrogate Courts Act, secs. 32, 33—Issue as to Validity of Gift inter Vivos—Absence of Personal Representative of Deceased Donor—Character of Executor Named in Will—Grounds for Refusal to Make Grant to—Secs. 50 and 54 of Act—Appeal—Costs.

The judgment of ORDE, J.A., 55 O.L.R. 566, was varied on appeal.

Held, that the issue as to the validity of a gift *inter vivos*, said to have been made by the testator to the defendant M. M. G., was not properly before the Court and should not have been adjudicated upon by ORDE, J.A.

The whole jurisdiction of the Supreme Court of Ontario as to granting letters probate of wills comes from the Surrogate Courts Act, R.S.O. 1914, ch. 62, secs. 32, 33; and in the present case, the cause having been removed from a Surrogate Court into the Supreme Court under sec. 33, the Supreme Court had no greater jurisdiction than the Surrogate Court, and could not, in the cause so removed, entertain a claim to set aside a *donatio inter vivos*.

1925. *Semble*, that the only person who could have a right to dispute the alleged gift was one with the right to represent the estate of the deceased.
- HARRIS
v.
GALLIMORE. A Surrogate Court in granting letters probate, cannot exclude the executor named in the will on account of bad character, bankruptcy, insolvency, or the like. The Surrogate Courts Act specifies the cases in which the named executor may be passed over: see secs. 50 and 54.
- Consideration of the question of costs.

THE defendants Mary May Gallimore, Walter D. Kew, and Elizabeth Kew, appealed from the judgment of ORDE, J.A., 55 O.L.R. 566. The defendant Harry Gallimore (executor) and the defendants Mary Ann Harris, Caroline Welch, and William Harris, also appealed from the judgment.

October 26. The appeals came on for hearing before LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

D. L. McCarthy, K.C., and *S. A. Hayden*, for the appellants Mary May Gallimore, Walter D. Kew, and Elizabeth Kew, contended that so much of the judgment as dealt with the \$8,000 which formed the subject of the alleged gift *inter vivos* could not stand.

J. A. Worrell, K.C., for the appellants Mary Ann Harris, Caroline Welch, and William Harris, stated that their appeal was from the judgment in so far as it determined that the document put forward as the last will was not a good testamentary instrument. As a settlement had been made between his clients and those claiming under an earlier will, his appeal was abandoned.

R. G. McClelland, for the appellant Harry Gallimore, the executor named in the last will, also abandoned his appeal.

Clive A. Thomson, for the plaintiff, Eveline Harris, acquiesced in the abandonment of these appeals.

October 30. The judgment of the Court was read by RIDDELL, J.A.:—In view of the irregular practice pursued in this matter, it will be well to set out the course of the proceedings.

The late John Harris died in 1921, leaving a document purporting to be his last will and testament, bearing date the 17th November, 1921, wherein the defendant Gallimore was named as executor.

The widow, Eveline Harris, lodged a caveat on the 30th December, 1921; the will was offered for probate the next day; and the widow, being warned, entered an appearance in the Surrogate Court of the County of York; Mary Ann Harris, Caroline Welch, and William Harris were cited and came in.

Before the Surrogate Court Judge the issues to be tried in the action were fixed, four in number:—

App. Div.

1925.

HARRIS

v.

GALLIMORE.

Riddell, J.A.

1. The due execution of the alleged will.
2. Procurement of the will by fraud and undue influence.
3. The testamentary capacity of John Harris.
4. If the will were duly executed without fraud and undue influence, and if John Harris were of testamentary capacity, should the Court hold that Gallimore is not a proper person to be executor and that he should not be granted letters of probate?

These issues were settled by order of the Surrogate Court Judge on the 3rd February, 1922, and they were directed to be tried before the learned Judge without a jury at Toronto on the 20th March, 1922.

An application was made by the caveatrix to transfer the cause to the Supreme Court; and, on the 23rd February, 1922, an order was made removing the cause from the Surrogate Court of the County of York to the Supreme Court of Ontario.

The same order made parties to the action, Mary May Gallimore (the wife of the executor named), Walter D. Kew and Elizabeth Kew (his wife), who were charged, along with the executor, with undue influence in bringing about the execution of the will. Then the order defined the issues to be tried:—

“(1) The said Harry Gallimore affirms and the said Eveline Harris denies that the said will was duly executed by the said John Harris, deceased.

“(2) The said Harry Gallimore affirms and the said Eveline Harris denies that the said John Harris, at the time of the alleged execution of the said will, was capable of making a last will and testament, and that he did in fact make and execute the will in question voluntarily, and knowing and appreciating its provisions, nature and effect.

“(3) The said Eveline Harris affirms and the said Harry Gallimore denies that the making of the said will was procured by the fraud and undue influence of the said Harry Gallimore, Mary May Gallimore, Walter D. Kew and Elizabeth Kew, or some or one of them, or by a person or persons acting for or in the interest or on behalf of these persons or some or one of them.”

So far the proceedings, except in a particular later to be mentioned, are proper: but the order proceeds to make the fourth issue to be tried the following:—

“(4) The said Eveline Harris alleges that in the event of it being shewn that the said will was properly executed and the said testator competent, the said Harry Gallimore is not a fit and pro-

App. Div. per person to act as executor and that probate should not be
1925. granted to him."

HARRIS
v.
GALLIMORE.
Riddell, J.A. Another issue not mentioned in the Surrogate Court was also
directed by the order to be tried—under the following circumstances.
After the execution of the alleged will, Mary May Gallimore re-
ceived from John Harris the sum of \$8,000 as a gift *inter vivos*:
those interested in the estate claimed that this was not a valid and
effective gift and accordingly the following was made the fifth
issue:—

"(5) Whether a certain sum of \$8,000 received from the late
John Harris by Mary May Gallimore, and alleged by her to be a
gift, was in fact and in law a good, valid, and effective gift or still
forms part of the estate of the deceased."

The case came on for trial before my brother Orde at Toronto;
the trial was long and exhaustive, over 650 pages of evidence being
taken.

The learned Judge, with hesitation, declined to find against the
will on the ground of mental incapacity, but, finding "the draw-
ing of the will appointing Gallimore executor . . . part of a
cleverly designed plot to deplete the estate in such a way as to
conceal the fact," and "the whole thing . . . open to the gravest
suspicion," he said that those propounding the will had failed to
satisfy him that the instrument really expressed the mind of the
testator—and he found as a fact that it did not (55 O.L.R. at
p. 579). This, of course, implied a finding of fraud on the part
of the executor. The learned Judge found also against the validity
of the alleged gift *inter vivos*.

It was not necessary for the trial Judge to pass upon the fourth
issue above set out.

From this judgment, the beneficiaries under the alleged will
appealed; the executor, instead of submitting his rights to the
Court, also served notice of appeal, so as to have the right (as
his counsel informs us) to urge independently that the judgment
should not stand.

Those claiming that the alleged gift *inter vivos* was valid also
appealed.

On the matter coming on for argument, it appeared that those
who were beneficiaries under the alleged will had made an arrange-
ment with those opposing—and informed us that they did not
intend to proceed with the appeal. Upon counsel for the executor
being called on to state his position, he said that he would not
proceed with his appeal.

The appeal in that regard should therefore be dismissed with

costs—had the executor been content to submit his rights to the Court, he might have been relieved from paying costs; but, making the fight his own and serving his own not ce of appeal, I know of no principle which would justify us in that course—he should pay the costs of his unsuccessful appeal.

App. Div.

1925.

HARRIS
v.

GALLAGHER.

Riddell, J.A.

As to the fifth issue, found against the donee, we expressed the opinion that the finding could not stand because that issue was not properly before the Court. Counsel most earnestly and vigorously contended that we should allow the judgment to stand in that regard; and it becomes necessary to examine into the matter with care.

Formerly the Supreme Court had jurisdiction in the case of wills: Judicature Act, R.S.O. 1897, ch. 51, sec. 38; but the Legislature, by 10 Edw. VII. ch 31, sec. 19 (Ont.), placed the whole jurisdiction in the Surrogate Court, except as otherwise specified; and now the whole jurisdiction of the Supreme Court as to granting probate comes from the Surrogate Courts Act, R.S.O. 1914, ch. 62, secs. 32, 33: *Mutrie v. Alexander* (1911), 23 O.L.R. 396, at p. 401; *Taylor v. Yeandle* (1912), 27 O.L.R. 531. Consequently an action to establish a will must be begun in the Surrogate Court; and, if it be desired to have it tried in the Supreme Court, application must be made under sec. 32 or sec. 33. In the present case, the application was under sec. 33; and when the cause was ordered to be removed it was the cause in the Surrogate Court, "the same" and no other, that came into the Supreme Court. In such a case, the Supreme Court has no original jurisdiction—it can try only what the Surrogate Court could try and nothing else.

The jurisdiction of the Surrogate Court did not extend to the determination of the validity of the alleged *donatio inter vivos*; and that of the Supreme Court in this proceeding was and is no more extensive. The order made for the trial of the fifth issue was made *per incuriam*, without jurisdiction—the trial of that issue was *coram non jndice*, and the judgment thereon cannot stand.

Even had the Court jurisdiction, I think the judgment could not stand — the only person who could have the right to dispute the alleged gift is one with the right to represent the estate of the deceased. Unless an administrator *ad litem* were appointed, no one could represent the estate until after letters of probate had been issued, or, if these were refused, letters of administration.

The widow naturally claims that the gift is invalid, but that does not clothe her with the right to dispute it. There is a proper way to have this issue tried in the Supreme Court: and, if and

App. Div. when there is a personal representative of the estate, proper proceedings may be taken.

1925.

HARRIS

v.

GALLIMORE.

Riddell. J.A.

Of course we express no opinion as to the merits; we do not even consider the merits—equally of course, neither the judgment of Mr. Justice Orde nor this judgment will operate as an estoppel on the trial of that issue.

I would allow the appeal in this respect, and, as this was opposed by the widow and Mr. Worrell's clients, I think these should pay the costs of the appeal and of all proceedings below in respect of this issue.

There is no finding in respect of the fourth issue, but we should not pass it over.

When a Surrogate Court grants letters of probate, it must grant them to the executor named in the will—it cannot exclude by reason of bad character, bankruptcy, insolvency, etc.: *In the Goods of Samson* (1873), 3 P. & D. 48; *Smethurst v. Tomlin* (1861), 2 Sw. & Tr. 143. Even where the executor admits an attempted fraud in respect of the will, etc., he cannot be passed over: *In the Goods of Hett* (1842), 6 Jur. 350. The Surrogate Courts Act carefully specifies the cases in which the executor named may be passed over: R.S.O. 1914, ch. 62, sec. 54; but the present case does not come within any of these provisions. We have not the case of infancy (sec. 50), lunacy, imbecility, idiocy, or imprisonment: *In the Estate of Drawmer* (1913), 108 L.T.R. 732. Here is a named executor, free, of full age and *compos mentis*. And the legislative provisions permitting the removal of executors, etc., are *nihil ad rem*: the Trustee Act, R.S.O. 1914, ch. 121, sec. 40; the Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 60. This issue should not have been fixed in the Surrogate Court or directed to be tried in the Supreme Court.

To avoid all possibility of misunderstanding, I set out here the result of the above:

1. The appeal against the judgment so far as it declares the alleged will invalid is dismissed—so far as that issue is concerned, the costs of the appeal and below to be paid by those appealing, namely, the alleged executor and the beneficiaries under the alleged will: those represented by Mr. McCarthy are excused, as they did not specifically appeal, but simply insisted on testamentary capacity as indicating capacity to make a valid *donatio inter vivos* to them at or about the same time.

2. The judgment will “for the guidance of the Surrogate Court be transmitted by the Surrogate Clerk to the Registrar of

the Surrogate Court " of the County of York under the Surrogate Courts Act, R.S.O. 1914, ch. 62, sec. 33 (4).

3. The appeal of Mr. McCarthy's clients against the finding and judgment on the fifth issue will be allowed with costs here and below throughout, payable by the widow and Mr. Worrell's clients—such allowance of the appeal not to be considered an adjudication on the merits.

The final result is that of the formal judgment clause 2 stands and clauses 3, 4, 5, 6, and 7 fall. Costs payable as above set out.

Judgment accordingly.

[November 16. The parties represented by Mr. Worrell moved the Court to change the direction as to the costs they were ordered to pay: counsel for the plaintiff informed the Court that her settlement with the applicants covered the costs, and abandoned all claim to costs in respect of the will. He also moved to have his client relieved from the costs of the abortive issue. The Court relieved from the costs concerning the will and dismissed the motion in other respects.]

[APPELLATE DIVISION.]

WILSON V. KINNAR.

1925.

Trial—Jury Notice—Striking out—Order Made by Judge at Toronto Jury Sittings—Discretion—Appeal—Rule 398(3).

Oct. 30.

There is no right of appeal from an order made by a Judge presiding at a jury sittings in Toronto striking out the jury notice given in an action set down for hearing at the sittings; and there is no distinction, in that respect, between an order made under Rule 398(3) and an order made at the hearing.

Brown v. Wood (1887), 12 P.R. 198, approved.

AN appeal by the plaintiff from an order of MEREDITH, C.J. C.P., presiding at a Toronto sittings for the trial of actions by juries, striking out the jury notice filed and served by the plaintiff.

October 26. The appeal came on for hearing before LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, J.J.A.

Erichsen Brown, for the appellant.

W. N. Tilley, K.C., and *C. F. H. Carson*, for the defendants McKinnon, White, and others, objected that no appeal lay.

Lyle Ramsey for the defendant H. W. Kinnear.

J. H. Fraser, for the defendant M. McClelland.

App. Div.

1925.

WILSON
v.

KINNEAR.

Middleton,

J.A.

October 30. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the plaintiff from an order made by the Chief Justice of the Common Pleas, presiding at a jury sittings in Toronto, at the opening of the Court, striking out the jury notice served by the plaintiff, and ordering the case to be transferred for trial to the Toronto non-jury sittings.

The action was brought in the Supreme Court of Ontario for the purpose of setting aside a will under the special jurisdiction conferred by sec. 38 of the Judicature Act, R.S.O. 1897, ch. 51, carried forward by virtue of sec. 3 of the Judicature Act, R.S.O. 1914, ch. 56.

Mr. Tilley took the preliminary objection that no appeal would lie to this Court from the decision of the learned Chief Justice. In our opinion, this objection is well taken.

In *Brown v. Wood* (1887), 12 P.R. 198, it was held that the discretion given to a trial Judge by sec. 255 of the Common Law Procedure Act could not be reviewed upon appeal, and that decision has been ever since regarded as settling the law.

In *McEwen v. Woodstock General Hospital Trust*, determined by this Court on the 2nd March, 1925, we have already held this. There, on the trial Judge striking out the jury notice, the plaintiff declined to proceed, and the action was dismissed. On the appeal we held that we had no right to interfere.

There is no room for any distinction between the order made by a Judge under clause 3 of Rule 398* and an order made at the hearing.

As pointed out in *Brown v. Wood* and in *Wise v. Canadian Bank of Commerce* (1922), 52 O.L.R. 342, an order made in Chambers may be reviewed upon appeal if the necessary leave to appeal is obtained under the provisions of Rule 507, but in such case the situation is entirely different. At a trial many things as to the course and conduct of the trial must, of necessity, be in the discretion of the presiding Judge. The only appeal given is from his decision upon the merits; all collateral matters, such as this, are finally disposed of by his ruling.

Appeal dismissed with costs.

* 398.—(3) The Judge presiding at a jury sittings in Toronto may in his discretion strike out the jury notice and transfer the action for trial to a non-jury sittings, and this power may be exercised notwithstanding that the case is not on the peremptory list for trial before the said Judge.

APPENDIX I.

RULES OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ADOPTED ON THE 2ND MAY, 1925, AND OPERATIVE ON THE 1ST JANUARY, 1926.

1.—(1) In these Rules, unless the context otherwise Interpre-
requires:— tation.

“Appeal” means an Appeal to His Majesty in Council;

“Judgment” includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer;

“Record” means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

“Registrar” means the Registrar or other proper officer having the custody of the records in the Court appealed from;

“Abroad” means the country or place where the Court appealed from is situate;

“Agent” means a person qualified by virtue of Her late Majesty’s Order in Council of the 6th March, 1896, to conduct proceedings before His Majesty in Council on behalf of another;

“Party” and all words descriptive of parties to proceedings before His Majesty in Council (such as “Petitioner,” “Appellant,” “Respondent”) mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent;

“Respondent” includes Intervener;

“Month” means calendar month;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition or other document, entering an Appearance, lodging security, or otherwise,

such step shall be taken in the Registry of the Privy Council, Downing Street, London.

Leave to Appeal.

Leave to
appeal
generally.

2. All Appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending Appellant.

Special Leave to Appeal.

Form of
Petition for
special leave
to appeal.

3. A petition for special leave to appeal to His Majesty in Council shall state succinctly and clearly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise His Majesty whether such leave ought to be granted, and shall be signed by the Counsel who attends at the hearing or by the party himself if he appears in person. The Petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought.

Five copies
of Petition
to be lodged
together
with Affi-
davits in
support.

4. The Petitioner shall lodge at least five copies of his Petition for special leave to appeal together with the Affidavit in support thereof prescribed by Rule 50 hereinafter contained, and unless a Caveat as prescribed by Rule 48 has been lodged by the other parties who appeared in the Court below, an Affidavit of service of notice of the intended application upon such parties or their Solicitors or Agents, either abroad or in England.

Time for
lodging
Petition.

5. A Petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the Petitioner shall, in every case, lodge his Petition with the least possible delay.

Security for
costs and
transmission
of Record.

6. Where the Judicial Committee agree to advise His Majesty to grant special leave to appeal, they shall, in their Report, specify the amount of the security for costs (if any) to be lodged by the Petitioner, and shall, unless the circumstances of a particular case render such a course unnecessary, provide for the transmission of the Record by the Registrar to the Registrar of the Privy Council and for such further matters as the justice of the case may require. Unless otherwise ordered the security shall be lodged at any time before the Appellant enters an Appearance.

7. Save as by the four last preceding Rules otherwise provided, the provisions of Rules 47 to 50 and 52 to 59 (all inclusive) hereinafter contained shall apply *mutatis mutandis* to Petitions for special leave to appeal. General provisions.

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal *in formâ pauperis*, but in addition to the Affidavits referred to in Rule 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the intended Appeal, and that he is unable to provide sureties, and also by a certificate of Counsel that the Petitioner has reasonable ground of appeal. Petitions for special leave to appeal in formâ pauperis.

9. Where a Petitioner obtains leave to appeal *in formâ pauperis*, he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees. Exemption of pauper Appellant from lodging security and paying Office fees.

10. A Petitioner whose Petition for leave to appeal *in formâ pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a Petitioner in respect of a Petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order. Exemption of unsuccessful Petitioner for leave to appeal in formâ pauperis from payment of Office fees.

Record and Appearance by Appellant.

11. As soon as the Appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the Appellant shall without delay take all necessary steps to have the Record transmitted to the Registrar of the Privy Council, and the Registrar shall, with all convenient speed, certify to the Registrar of the Privy Council that the Respondent has received notice, or is otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or is otherwise aware, of the dispatch of the Record to England. Where an Appellant who has obtained special leave to appeal by an Order of His Majesty in Council fails to have the Record transmitted to the Registrar of the Privy Council with due diligence, the Registrar of the Privy Council shall call upon the Appellant to explain his default, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may issue a Summons to the Appellant Record to be transmitted without delay.

calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the special leave to appeal granted should not be rescinded. The Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty to rescind the grant of special leave to appeal or give such other directions therein as the justice of the case may require.

Printing of
Record.

12. The Record shall be printed in accordance with the Rules contained in Schedule A hereto. It may be printed either abroad or in England. When printed abroad the parties in England shall, upon perusal, consider whether the order of the documents is in accordance with these Rules, and if it is not they shall agree upon the proper order. The Appellant shall then rearrange copies of the Record for the use of the Judicial Committee and the other parties. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

Number of
copies to be
transmitted,
where
Record
printed
abroad.

13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

One certified
copy to be
transmitted,
where
Record to be
printed in
England.

14. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

Record print-
ed partly
abroad,
partly in
England.

15. Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

Reasons for
judgments to
be included.

16. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall be included in the Record.

17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a typewritten list to be transmitted with the Record.

Exclusion of unnecessary documents from Record.

18. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

Documents objected to to be indicated.

19. As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, and the description whether "printed" or "written." A Record, or any part of a Record, not printed in accordance with the Rules contained in Schedule A hereto shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

Registration and numbering of Records.

20. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

Inspection of Record by parties.

21. The Appellant shall enter an Appearance before taking any step in the prosecution of the Appeal, and after entering such Appearance, shall forthwith give notice thereof to the Respondent, if the latter has entered an Appearance.

Appearance by Appellant.

22. Where the Record arrives in England either wholly written, or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts, enter an Appearance and bespeak a typewritten

Times within which a copy of a written Record shall be bespoken.

copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—2d. per folio of English matter, 2½d. per folio of Indian matter, and 3½d. per folio of foreign matter; and shall also engage to pay at such price as shall be fixed by the Registrar of the Privy Council the cost of printing at least 50 copies thereof.

Preparation
of copy of
Record for
printer.

23. As soon as the Appellant has obtained the typewritten copy of the Record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the index, to insert marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose of preparing the copy for the printer, in accordance with the Rules contained in Schedule A hereto, and shall, if the Respondent has entered an Appearance, submit the copy, as prepared for the printer, to the Respondent for his approval. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the Privy Council who, if he thinks fit, may require the parties to attend before the Judicial Committee for directions.

Lodging
copy of
Record for
printing.

24. As soon as the typewritten copy of the Record is ready for the printer, the Appellant shall lodge it in the Registry of the Privy Council for printing by a printer selected by the Registrar of the Privy Council, and at the same time shall lodge the amount of the estimated cost of printing the Record.

Special Case.

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a Special Case, and print such parts only of the Record as may be necessary for the discussion of the same. Provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him, and having heard them, and examined the Record, may report to the Judicial Committee as to the nature of the proceedings.

Examina-
tion of
proof of
Record and
striking off
copies.

26. The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at

the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record, and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been completed, the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

27. Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the Record.

Number of
copies of
Record for
parties.

28. Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with Rule 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

How costs
of printing
Record are
to be borne.

Petition of Appeal.

29. The Appellant shall lodge his Petition of Appeal—

- (a) Where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and within a period of two months from the same date in the case of Appeals from any other Courts;
- (b) Where the Record arrives in England written, within a period of one month from, but not before, the date of the completion of the printing thereof:

Times within
which Peti-
tion shall
be lodged.

Provided that nothing in this Rule contained shall preclude the Appellant from lodging his Petition of Appeal prior to the arrival of the Record, or the completion of the printing thereof, if there are special reasons why, in the opinion of the Registrar of the Privy Council, it should be desirable for him to do so.

30. The Petition of Appeal shall be lodged in the form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commence-

Form of
Petition.

ment thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case.

Service of
Petition.

31. The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

Withdrawal
of Appeal
before
Petition of
Appeal has
been lodged.

32. Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify the Registrar of the Court appealed from that the Appeal has been withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order.

Withdrawal
of Appeal
after
Petition of
Appeal has
been lodged.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance, or having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of Rule 56 hereinafter contained.

Non-Prosecution of Appeal.

Dismissal
of Appeal
where Ap-
pellant takes
no step in
prosecution
thereof.

34. Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B hereto, or within a period of two months from the same date as in the case of an Appeal from any other Court, the Registrar of the Privy Council shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to any Respondent who has entered an Appearance in the Appeal.

- 35.** Where an Appellant who has entered an Appearance—
- (a) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, Rule 22; or
 - (b) having bespoken such copy within the periods prescribed by Rule 22, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record; or
 - (c) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29;

Dismissal of Appeal for non-prosecution after Appellant's Appearance and before lodgment of Petition of Appeal.

the Registrar of the Privy Council shall call upon the Appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his Appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the Appeal should not be dismissed for non-prosecution. Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal, the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

Dismissal of Appeal for non-prosecution after lodgment of Petition of Appeal.

Restoring an Appeal dismissed for non-prosecution.

37. An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

Appearance by Respondent,

Time within which Respondent may appear.

38. The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

Notice of Appearance by Respondent.

39. The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

Form of Appearance where all the Respondents do not appear.

40. Where there are two or more Respondents, and only one, or some, of them enter an Appearance, the Appearance Form shall set out the names of the appearing Respondents.

Separate Appearances.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

Non-appearing Respondent not entitled to receive notices or lodge Case.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a case in the Appeal.

Procedure on non-appearance of Respondent.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall, subject to any special Order of the Judicial Committee to the contrary, apply:—

- (a) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was otherwise aware, of the dispatch of the Record to England, the

appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal;

- (b) if the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the record as a Respondent, the Appeal may, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent:

Provided that where it is shown to the satisfaction of the Registrar of the Privy Council, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clauses (a) and (b) respectively and has failed to effect such service, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may, without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

44. A Respondent who desires to defend an Appeal *in formâ pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the Appeal. Respondent
defending
Appeal in
formâ pau-
peris.

Petitions Generally.

45. All Petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to an Appeal shall be addressed to the Judicial Committee. All other Petitions Mode of
addressing
Petitions.

shall be addressed to His Majesty in Council, but a Petition which is properly addressed to His Majesty in Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure."

Orders on
Petitions
which need
not be
drawn up.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

Form of
Petition
and number
of copies to
be lodged.

47. All Petitions shall consist of paragraphs numbered consecutively and shall be written, typewritten, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the full title and Privy Council number of the Appeal to which the Petition relates or the full title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed, except as provided by Rule 3. Unless the Petition is a Consent Petition within the meaning of Rule 56 at least five copies thereof shall be lodged.

Caveat.

48. Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Registry of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged, and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

Service of
Petition.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

50. A Petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact which cannot be verified by reference to the registered Record or any certificate or duly authenticated statement of the Court appealed from, shall be supported by Affidavit. Where the Petitioner prosecutes his Petition in person, the said Affidavit shall be sworn by the Petitioner himself and shall state that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true. Where the Petitioner is represented by an Agent, the said Affidavit shall be sworn by such Agent and shall, besides stating that, to the best of the deponent's knowledge, information, and belief, the allegations contained in the Petition are true, show how the deponent obtained his instructions and the information enabling him to present the Petition.

Verifying
Petition by
Affidavit.

51. A Petition for an Order of Revivor or Substitution shall be accompanied by a certificate or duly authenticated statement from the Court appealed from showing who, in the opinion of the said Court, is the proper person to be substituted, or entered on the Record in place of, or in addition to, a party who has died or undergone a change of status.

Petition for
Order of
Revivor or
Substitution.

52. The Registrar of the Privy Council may refuse to receive a Petition on the grounds that it discloses no reasonable cause of appeal, or is frivolous, or contains scandalous matter, but the Petitioner may appeal, by way of motion, from such refusal to the Judicial Committee.

Petition
disclosing no
reasonable
cause of
appeal or
containing
scandalous
matter to be
refused.

53. As soon as a Petition and all necessary documents are lodged the Petition shall thereupon be deemed to be set down.

Setting down
Petition.

54. On each day appointed by the Judicial Committee for the hearing of Petitions the Registrar of the Privy Council shall, unless the Committee otherwise direct, put in the paper for hearing all such Petitions as have been set down. Provided that, in the absence of special circumstances of urgency to be shown to the satisfaction of the said Registrar, no Petition, if opposed, shall be put in the paper for hearing before the expiration of ten clear days from the lodging thereof, unless the Opponent consents to the Petition being put in the paper on an earlier day.

Times within
which set-
down Peti-
tions shall
be heard.

Notice to parties of day fixed for hearing Petition.

55. Subject to the provisions of the next following Rule, the Registrar of the Privy Council shall, as soon as the Judicial Committee have appointed a day for the hearing of a Petition, notify all parties concerned by Summons of the day so appointed.

Procedure where Petition is consented to or is formal.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last-preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made and of the date and nature of such Report or Order.

Withdrawal of Petition.

57. A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last-preceding Rule.

Procedure. where hearing of Petition unduly delayed.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may, after notifying all parties interested by Summons of his intention to do so, put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon.

Only one Counsel heard on a side in Petitions.

59. At the hearing of a Petition not more than one Counsel shall be admitted to be heard on a side.

Case.

Lodging of Case.

60. No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case

in the Appeal. Provided that where a Respondent who has entered an Appearance does not desire to lodge a Case in the Appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

61. The Case may be printed either abroad or in England, and shall, in either event, be printed in accordance with the Rules I. to III. contained in Schedule A hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal or by the party himself if he conducts his Appeal in person.

Printing of
Case.

62. Each party shall lodge 30 prints of his Case.

Number of
prints to be
lodged.

63. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The Taxing Officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

Form of
Case.

64. Two or more Respondents may, at their own risk as to costs, lodge separate Cases in the same Appeal.

Separate
Cases by
two or more
Respondents.

65. Each party shall, after lodging his Case, forthwith give notice thereof to the other party.

Notice of
lodgment
of Case.

66. Subject as hereinafter provided, the party who lodges his Case first may, at any time after the expiration of three clear days from the day on which he has given the other party the notice prescribed by the last-preceding Rule, serve such other party, if the latter has not in the meantime lodged his Case, with a "Case Notice," requiring him to lodge his Case within one month from the date of the service of the said Case Notice and informing him that, in default of his so doing, the Appeal will be set down for hearing *ex parte* as against him, and if the other party fails to comply with the said Case Notice, the party who has lodged his Case may at any time after the expiration of the time limited by the said Case Notice for the lodging of

Case Notice.

the Case, lodge an Affidavit of Service (which shall set out the terms of the said Case Notice), and the Appeal shall thereupon, if all other conditions of its being set down are satisfied, be set down *ex parte* as against the party in default. Provided that no Case Notice shall be served until after the completion of the printing, or re-arrangement under Rule 12, of the Record, and also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

Setting down
Appeal and
exchanging
Cases.

67. Subject to the provisions of Rule 43 and of the last-preceding Rule, an Appeal shall be set down *ipso facto* as soon as the Cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Binding Records, &c.

Mode of
binding
Records,
&c., for use
of Judicial
Committee.

68. As soon as an Appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by incuts, shall be arranged in the following order: (1) Appellant's Case; (2) Respondent's Case; (3) Record (if in more than one part, showing the separate parts by incuts, all parts being paged at the top of the page); (4) Supplemental Record (if any); and the short title and Privy Council number of the Appeal shall also be shown on the back.

Time within
which bound
copies shall
be lodged.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

Hearing.

Notice of
day on or
before which
Appeals
must be set
down for
ensuing
Sittings.

70. The Registrar of the Privy Council shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for the ensuing Sittings. All Appeals set down on or before the day named shall, subject to any directions

from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business and shall, subject to any directions from the Committee to the contrary, be heard in the order in which they are set down.

71. The Registrar of the Privy Council shall, subject to the provisions of Rule 42, notify the parties to each Appeal by Summons, at the earliest possible date, of the day appointed by the Judicial Committee for the hearing of the Appeal, and the parties shall be in readiness to be heard on the day so appointed.

Notice to parties of day fixed for hearing Appeal.

72. At the hearing of an Appeal not more than two Counsel shall be admitted to be heard on a side.

Only two Counsel heard on a side in Appeals.

73. In Admiralty Appeals the Judicial Committee may, if they think fit, require the attendance of two Nautical Assessors.

Nautical Assessors.

Judgment.

74. Where the Judicial Committee, after hearing an Appeal, decide to reserve their judgment thereon, the Registrar of the Privy Council shall in due course notify the parties by Summons of the day appointed by the Committee for the delivery of the Judgment.

Notice to parties of day fixed for delivery of Judgment.

Costs.

75. All Bills of Costs under the Orders of the Judicial Committee on Appeals, Petitions, and other matters, shall be referred to the Registrar of the Privy Council, or such other person as the Judicial Committee may appoint, for taxation, and all such taxations shall be regulated by the Schedule of Fees set forth in Schedule C hereto.

Taxation of costs.

76. The taxation of costs in England shall be limited to costs incurred in England.

What costs taxed in England.

77. The Registrar of the Privy Council shall, with all convenient speed after the Judicial Committee have given their decision as to the costs of an Appeal, Petition, or other matter, issue to the party to whom costs have been awarded an Order to tax and a Notice specifying the day and hour appointed by him for taxation. The party receiving such Order to tax and Notice shall, not less than 48 hours before the time appointed for taxation, lodge his Bills of Costs (together with all necessary vouchers for disbursements), and serve the opposite party with a copy of his Bills of Costs and of the Order to tax and Notice.

Order to tax.

Power of Taxing Officer where taxation delayed through the fault of the party whose costs are to be taxed.

Appeal from decision of Taxing Officer.

Amount of taxed costs to be inserted in His Majesty's Order in Council.

Taxation on the pauper scale.

Security to be dealt with as His Majesty's Order in Council determining Appeal directs.

Power of Judicial Committee to excuse from compliance with Rules.

78. The Taxing Officer may, if he think fit, disallow to any party who fails to lodge his Bill of Costs (together with all necessary vouchers for disbursements) within the time prescribed by the last-preceding Rule, or who in any way delays or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from his taxation to the Judicial Committee and subject to any direction from the Committee to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-eighths of the usual professional charges in ordinary Appeals. Such pauper scale shall apply to and include the application upon which leave to appeal *in formâ pauperis* was granted.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Miscellaneous.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable

that the application should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

84. Any document lodged in connection with an Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee, may be amended by leave of the Registrar of the Privy Council, but if the said Registrar is of opinion that an application for leave to amend should be dealt with by the Committee in open Court, he may direct the party applying to lodge in the Registry of the Privy Council, and to serve the opposite party with, a Notice of Motion returnable before the Committee.

Amendment
of docu-
ments.

85. Affidavits relating to any Appeal, Petition, or other matter pending before His Majesty in Council or the Judicial Committee may be sworn before the Registrar of the Privy Council.

Affidavits
may be
sworn before
the Registrar
of the Privy
Council.

86. Where a party to an Appeal, Petition, or other matter pending before His Majesty in Council changes his Agent, such party, or the new Agent, shall forthwith give the Registrar of the Privy Council and the outgoing Agent notice in writing of the change, and shall amend the Appearance accordingly. Until such notices are given the former Agent shall be considered the Agent of the party until the final conclusion of the Appeal, Petition, or other matter.

Change of
Agent.

87. Subject to the provisions of any Statute or of any Statutory Rule or Order to the contrary, these Rules shall apply to all matters falling within the Appellate Jurisdiction of His Majesty in Council.

Scope of
application
of Rules.

88. These Rules may be cited as the Judicial Committee Rules, 1925, and they shall come into operation on the 1st day of January, 1926.

Mode of
citation and
date of
operation.

Schedule A.

Rules as to Printing.

I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

IV. Records shall be arranged in two parts in the same volume, where practicable, viz.:—

Part I. The pleadings and proceedings, the transcript of the evidence of the witnesses, the Judgments, Decrees, &c., of the Courts below, down to the Order admitting the Appeal.

Part II. The exhibits and documents.

V. The Index to Part I shall be in chronological order, and shall be placed at the beginning of the volume.

The Index to Part II shall follow the order of the exhibit mark, and shall be placed immediately after the Index to Part I.

VI. Part I shall be arranged strictly in chronological order, *i.e.*, in the same order as the index.

Part II shall be arranged in the most convenient way for the use of the Judicial Committee, as the circumstances of the case require. The documents shall be printed as far as suitable in chronological order, mixing Plaintiff's and Defendant's documents together when necessary. Each document shall show its exhibit mark, and whether it is a Plaintiff's or Defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as

(a) a series of correspondence, or

(b) proceedings in a suit other than the one under appeal, shall be kept together. The order in the Record of the documents in Part II will probably be different from the order of the Index, and the proper page number of each document shall be inserted in the printed Index.

The parties will be responsible for arranging the Record in proper order for the Judicial Committee, and in difficult cases Council may be asked to settle it.

VII. The documents in Part I shall be numbered consecutively.

The documents in Part II shall not be numbered, apart from the exhibit mark.

VIII. Each document shall have a heading which shall consist of the number or exhibit mark and the description of the document in the Index, without the date.

IX. Each document shall have a marginal note which shall be repeated on each page over which the document extends, viz.:—

Part I.

(a) Where the case has been before more than one Court, the short name of the Court shall first appear. Where the case has been before only one Court, the name of the Court need not appear.

(b) The marginal note of the document shall then appear consisting of the number and the description of the document in the Index, with the date, except in the case of oral evidence.

(c) In the case of oral evidence, "Plaintiff's evidence" or "Defendant's evidence" shall appear beneath the name of the Court, and then the marginal note consisting of the number in the Index and the witness's name, with "examination," "cross-examination," or "re-examination," as the case may be.

Part II.

The word "Exhibits" shall first appear.

The marginal note of the exhibit shall then appear consisting of the exhibit mark and the description of the document in the Index, with the date.

X. The parties shall agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the Index and in the Record), if desired, with the words "not printed" against it.

A long series of documents, such as accounts, rent rolls, inventories, &c., shall not be printed in full, unless Counsel so advise, but the parties shall agree to short extracts being printed as specimens.

XI. In cases where maps sent from abroad are of an inconvenient size or unsuitable in character, the Appellant shall, in agreement with the Respondent, prepare in England, from the materials sent from abroad, maps drawn properly to scale and of reasonable size, showing, as far as possible, the claims of the respective parties, in different colours.

Schedule B.

Countries and places referred to in Rules 22, 29, and 34.

Australia.
British Honduras.
British North Borneo.
Brunei.
Ceylon.
China.
Eastern African Dependencies.
Falkland Islands.
Federated Malay States.
Fiji.
Hong Kong.
India.
Mauritius.
New Zealand.
Persia.
Seychelles.
Somaliland Protectorate.
Straits Settlements.

Schedule C.

1.

FEES ALLOWED TO AGENTS CONDUCTING APPEALS OR OTHER MATTERS BEFORE
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(33½ per cent. is added to these fees.)

	£	s.	d.
Retainer fee	0	13	4
Drawing Appearance or Caveat	0	5	0
Perusing printed Record, for every printed sheet of 8 pages....	1	1	0
Perusing written Record, for every 25 folios.....	0	6	8
Drawing Index per folio	0	2	0
Drawing Marginal Notes and Headings per folio	0	0	6
Attending at the Registry to examine proof print of Record with the certified Record per day	3	3	0
..... per half-day	1	11	6
Correcting revised print of Record, per sheet of 8 pages:			
Foreign or Indian cases	1	1	0

	£	s.	d.
Other cases	0	10	6
Instructions for Petition or Motion, or to Oppose.....	0	10	0
Instructions for Petition of Appeal	0	10	0
Instructions for Case	1	0	0
Drawing Petition, Motion, Case or Affidavit	per folio	0	2
Copying Petition, Motion, Case or Affidavit	per folio	0	0
Correcting proof of Case, per sheet of 8 pages:			
Foreign or Indian cases	1	1	0
Other cases	0	10	6
Drawing and fair copy Case Notice	0	10	0
Perusing Petition, Motion, or Affidavit	per folio	0	2
Perusing Petition of Appeal	1	1	0
Perusing Case, per printed sheet of 8 pages	1	1	0
Instructions for and preparing Retainer to Counsel	0	10	0
Instructions to Counsel to argue an Appeal	1	0	0
Instructions to Counsel to argue a Petition or Motion	0	10	0
Instructions to printer	0	10	0
Attending Consultation	1	0	0
Attending at the Council Chamber for the hearing of a Petition or Motion	1	6	8
Attending at the Council Chamber all day on an Appeal not called on	2	6	8
Attending the hearing of an Appeal	per day	3	6
Attending a Judgment		1	6
Approving draft Order		0	10
Attendances generally		0	10
Attendances on Counsel where fee is 30 guineas or over.....		1	0
Drawing Bill of Costs	per folio	0	1
Copying Bill of Costs	per folio	0	0
Attending Taxation of Costs of an Appeal		2	2
Attending Taxation of Costs of a Petition or Motion		1	1
Sessions Fee for each year or part of a year from the date of Appearance (in Appeals only)		3	3
Letters, &c. (in Petitions)		1	1
Letters, &c. (in Appeals) for 1st year		2	2
For each following year		1	1

11.

Council Office Fees.

Entering Appearance	1	0	0
Amending Appearance	0	10	0
Examining proof print of Record with the certified record at the Registry (chargeable to Appellant only)..... per day	2	0	0
per half-day	1	0	0
Lodging Petition of Appeal	3	0	0
Lodging Petition for special leave to appeal	2	0	0
Lodging any other Petition or Motion	1	0	0
Lodging Case or Notice under Rule 60	2	0	0
Setting down Appeal (chargeable to Appellant only)	5	0	0
Setting down Petition for special leave to appeal (chargeable to Petitioner only)	2	0	0
Setting down any other Petition (chargeable to Petitioner only)	1	0	0
Summons	1	0	0
Committee Report on Petition	2	0	0
Committee Report on Appeal	3	0	0
Original Order of His Majesty in Council determining an Appeal	5	0	0

	£	s.	d.
Any other original Order of His Majesty in Council	3	0	0
Plain copy of an Order of His Majesty in Council	0	5	0
Original Order of the Judicial Committee	2	0	0
Plain copy of Committee Order	0	5	0
Lodging Affidavit	0	10	0
Certificate delivered to parties	0	10	0
Lodging Caveat	1	0	0
Subpœna to witnesses	0	10	0
Taxing Fee 6d. for each pound allowed, or a fraction thereof, up to £300, and one per cent. beyond that sum, calculated at the rate of 5s. for each £25, or a portion thereof.			

APPENDIX II.

Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 56 of the Ontario Law Reports:—

CANADIAN NATIONAL RAILWAY CO. AND CITY OF OTTAWA, RE, 56 O.L.R. 153, affirmed by the Supreme Court of Canada: CITY OF OTTAWA V. CANADIAN NATIONAL RAILWAYS, [1925] S.C.R. 494.

CANADIAN WESTINGHOUSE CO. LTD. V. CANADIAN PACIFIC RAILWAY CO., 54 O.L.R. 238, reversed by the Supreme Court of Canada: CANADIAN WESTINGHOUSE CO. V. CANADIAN PACIFIC RAILWAY CO., [1925] S.C.R. 579.

CAPREOL, TOWN OF, AND CANADIAN NATIONAL RAILWAY CO., RE, 56 O.L.R. 62, affirmed by the Supreme Court of Canada: CANADIAN NATIONAL RAILWAYS V. TOWN OF CAPREOL, [1925] S.C.R. 499.

CARMICHAEL V. CARSCALLEN, 23 O.W.N. 310, reversed by the Supreme Court of Canada: CARSCALLEN V. CARMICHAEL, [1925] S.C.R. 560.

JUDICATURE ACT, 1924, RE, 56 O.L.R. 1, affirmed by the Judicial Committee, subject to a modification: ATTORNEY-GENERAL FOR ONTARIO V. ATTORNEY-GENERAL FOR CANADA, [1925] A.C. 750.

NUTSON V. HANRAHAN, 53 O.L.R. 99, affirmed by the Supreme Court of Canada: NUTSON V. HANRAHAN, [1925] S.C.R. 662.

ORPEN V. ROBERTS, 26 O.W.N. 401, affirmed by the Supreme Court of Canada: ORPEN V. ROBERTS, [1925] S.C.R. 364.

WINDSOR, CITY OF, V. TURNER, 26 O.W.N. 221, reversed by the Supreme Court of Canada: CITY OF WINDSOR V. TURNER, [1925] S.C.R. 413.

INDEX.

ACCIDENT INSURANCE.

See INSURANCE, 5.

ACCOUNTANTS.

See BANKRUPTCY, 7.

ACCRETIONS.

See WILL, 7.

ACKNOWLEDGMENT.

See COMPANY, 2.

ACQUIESCENCE.

See COVENANT, 2.

ADMINISTRATION ORDER.

See EXECUTORS AND ADMINISTRATORS, 2.

ADMISSIONS.

See ILLEGITIMACY.

ADULTERY.

See ILLEGITIMACY.

ADVERSE POSSESSION.

See LIMITATION OF ACTIONS.

ADVERTISING.

See DENTIST.

AFFIDAVITS.

See BANKRUPTCY, 2—HUSBAND AND WIFE—MECHANICS' LIENS—MINES AND MINING.

AGENT.

See CONTRACT, 3—INSURANCE, 1—SALE OF GOODS, 2, 3.

AGREEMENT.

See CONTRACT—VENDOR AND PURCHASER.

ALLOTMENT.

See COMPANY, 5.

AMENDMENT.

See CRIMINAL LAW, 4—DIVISION COURTS—INSURANCE, 2—VENDOR AND PURCHASER, 2.

APPEAL.

Judgment of Appellate Division — Plaintiff Appealing to Privy Council and Defendant to Supreme Court of Canada—Motions for Allowance of Security upon each Appeal — Supreme Court Act, R.S.C. 1906, ch. 139, sec. 75, and Rule 2—Privy Council Appeals Act, R.S.O. 1914, ch. 54—Practice — Stay of Proceedings—Application for, to Supreme Court of Canada.

POST V. LANGELL, 200.

See CONTRACT, 1, 2—COSTS, 2—CRIMINAL LAW, 5, 6—DENTIST—EXECUTORS AND ADMINISTRATORS, 1—JUDGMENT—MECHANICS' LIENS—MINES AND MINING—SOLICITOR—SURVIVORSHIP—TRIAL—WILL, 1.

APPELLATE DIVISION.*See* APPEAL.**APPOINTMENT OF NEW TRUSTEE.***See* TRUSTS AND TRUSTEES, 1.**APPORTIONMENT OF DAMAGES.***See* NEGLIGENCE, 1.**APPRAISAL.***See* CONTRACT, 1.**ARBITRATION AND AWARD.**

Price to be Paid for Electric Power Supplied—Submission to Arbitration—Power Commission—Statutory Corporation—Ultra Vires—Award—Nullity—Ex post Facto Consent of Attorney-General—Power Commission Act, R.S.O. 1914, ch. 39, sec. 16—Action to Enforce Award—Motion to Set it aside.

BEACH v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, 603.

See MUNICIPAL CORPORATIONS, 1.

ARREST.*See* CRIMINAL LAW, 5.**ASSESSMENT AND TAXES.**

Income Assessment—Assessment Act, sec. 5—Resident of Foreign Country—Income Earned and Received in Ontario.

RE FOX AND CITY OF WINDSOR, 243.

See CONSTITUTIONAL LAW, 2.**ASSIGNMENT OF BOOK-DEBTS.***See* BANKRUPTCY, 2.**ATTORNEY-GENERAL.***See* ARBITRATION AND AWARD.**AUTHORITY OF DECISIONS.***See* CRIMINAL LAW, 5.**AUTOMOBILE INSURANCE.***See* INSURANCE, 1.**AWARD.***See* ARBITRATION AND AWARD.**BAIL.***See* CRIMINAL LAW, 5.**BAILMENT.**

Warehouseman—Storage of Grain Shipped to Warehouse by Lake-vessel—Instructions from Shippers to Ship Grain by Rail to Purchasers—Delivery to one Purchaser without Production of Lake-bills of Lading—Failure of Purchaser to Pay for Grain—Action against Warehouseman to Recover Damages for Loss—Absence of Request or Direction from Shipper—Omission of Warehouseman to Instruct Railway Company—Whether Duty Owed to Shipper.

NORTHERN GRAIN CO. LTD. v. GODERICH ELEVATOR AND TRAN-SIT CO. LTD., 1.

BANKRUPTCY.

1. *Adjudication of — Whether Applicable to Partnership as such.*

RE CLUFF BROTHERS, 662.

2. *Claim of Bank to Assets of Debtor — Securities — Assignment of Book Debts — Registration under Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29 (Ont.) — Compliance with Act — Affidavit of Execution — Sufficiency — Description of Commissioner — Hypothecation of Bills of Lading and Warehouse Receipts — Title of Bank to Goods — Right to Proceeds — Security under sec. 88 of Bank Act — Pledge — Validity — Assignment of Insurance Policies.*

DENISON V. UNION BANK OF CANADA, 374.

3. *Distress by Landlord upon Chattels of Debtor — Payment of Sales Tax out of Moneys Realised — Claim of Trustee to Balance of Fund — Priorities — Effect of sec. 17 of 12 & 13 Geo. V. ch. 47 (Dom.), Amending Special War Revenue Act, 1915.*

RE CALCUS CO. LTD., 272.

4. *Incorporated Company — Debentures — Sale and Delivery to Purchaser before Filing of Prospectus — Ontario Companies Act, secs. 101(1), 105 — Judgment for Enforcement of Charge Created by Debentures — Questioning Validity of Debentures — Qualified Right of Unsecured Creditors — Authorised Trustee in*

BANKRUPTCY—(Con.)

Bankruptcy — Estoppel — Validity of Debentures in Hands of Purchaser and Assign.

MARTIN V. CLARKSON, 499.

5. *Receiving Order — Application for, by Sole Creditor — Discretion to Refuse — Bankruptcy Act, sec. 4(6) — “Sufficient Cause” — No Advantage Accruing to Creditors — Judgment Obtained against Debtor and Execution in Hands of Sheriff — Property of Debtor, Present and Future, Exigible — Married Woman not Carrying on Trade or Business — Secs. 2(o), (v), 8 (1), and 75 of Act.*

RE STONE, 640.

6. *Sale of Goods to Debtor in Ontario by Vendor in Quebec — Place of Contract — Orders Obtained in Ontario by Agent of Vendor — Acknowledgment — Acceptance — Departure from Contract — Deliveries in Instalments — Attempt by Vendor to Cancel Sale and Recover Goods from Trustee — Revendication — Resiliation — Quebec Civil Code, art. 1543.*

RE HUDSON FASHION SHOPPE LTD., 505.

7. *Trustee — Disbursements — Sums Paid to Partners and Clerks — Employment of Partner as Accountant — General Rule Governing Trustees — Modification by Bankruptcy Act, sec. 40, subsecs. 3, as Amended by 13 & 14 Geo. V. ch. 31, sec. 23 — Sec.*

BANKRUPTCY—(Con.)

20, *subsec. 1(d)* — *Bankruptcy Rule 108A.*

RE BRYANT ISARD & Co., 471.

See PARTNERSHIP — REVENUE — SALE OF GOODS, 1.

BANK ACT.

See CRIMINAL LAW, 1, 2, 3.

BANKS AND BANKING.

Winding-up—Contributories — Double Liability of Shareholders — Trust Company Holding Shares as Trustee—Bank Act, 1923, 13 & 14 Geo. V. ch. 32, sec. 53(a)—Relief from Personal Liability—Copy of Probate of Will Creating Trust Lodged with Bank—Entries in Books of Bank—Will “Named” in Books “in Connection with such Holding”—Shares Held in Representative Capacity — Reservation of Claim against Executor for Failure to Retain Assets of Estate Sufficient to Answer Possible Liability.

RE HOME BANK OF CANADA, NATIONAL TRUST Co.’s CASE, 27.

See BANKRUPTCY, 2 — CRIMINAL LAW, 1, 2, 3—HUSBAND AND WIFE—REVENUE—SET-OFF.

BENEFICIARIES.

See CONSTITUTIONAL LAW, 2—INSURANCE, 4—SURVIVORSHIP — WILL.

BEQUEST.

See WILL.

BILLS AND NOTES.

See PROMISSORY NOTES—REVENUE.

BILLS OF LADING.

See BAILMENT—BANKRUPTCY, 2.

BOARD OF RAILWAY COMMISSIONERS.

See RAILWAY, 1.

BOARD OF REFERENCE.

See CONSTITUTIONAL LAW, 1.

BONDS.

See BANKRUPTCY, 4 — COMPANY, 3.

BOOK-DEBTS.

See BANKRUPTCY, 2.

BROKERS.

Dealings in Foreign Stocks and Commodities—Profits—Payment over to Customer—Rate of Exchange—Whether Customer Entitled to Benefit of Difference—Accounting—Times at which Exchange to be Accounted for—Costs.

CUTTEN v. BICKELL, 113.

See PARTNERSHIP.

BUILDING RESTRICTIONS.

See COVENANT, 1.

BUILDINGS.

See FIXTURES—LANDLORD AND TENANT, 1.

BULK SALES ACT.

See SALE OF GOODS, 1.

CANADIAN NATIONAL RAILWAY COMPANY.

See RAILWAY, 1.

CARRIERS.

See SALE OF GOODS, 3.

CASES.

Agricultural Savings and Loan Co. v. Liverpool and London and Globe Insurance Co. (1901), 3 O.L.R. 127, followed. LONDON LOAN AND SAVINGS CO. OF CANADA LTD. v. UNION INSURANCE CO. OF CANTON LTD., 651.

Allen v. Gold Reefs of West Africa Ltd., [1900] 1 Ch. 656, referred to. *M. J. O'BRIEN LTD. v. BRITISH AMERICA NICKEL CORPORATION LTD. AND NATIONAL TRUST CO. LTD.*, 536.

Allinson v. General Council of Medical Education and Registration, [1894] 1 Q.B. 750, specially referred to. RE DAVIDSON AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, 222.

Amalgamated Society of Carpenters and Joiners v. Sinclair (1925), 56 O.L.R. 559, considered and distinguished. SELLORS v. WOODRUFF, 582.

Andreas v. Canadian Pacific Railway Co. (1905), 37 Can. S.C.R. 1, followed. WESTENFELDER v. HOBBS MANUFACTURING CO. LTD., 31.

Ardagh v. County of York (1896), 17 P.R. 184, approved. MACKIE v. HAMILTON BOARD OF HEALTH, 93.

Badman Brothers v. The King, [1924] 1 K.B. 64, followed. FITZPATRICK v. THE KING, 178.

CASES—(Continued.)

Bailey v. Gould (1840), 4 Y. & C. Ex. 221, not followed. RE GAMBLE, 504.

Bank of Montreal v. Demers (1899), 29 Can. S.C.R. 435, followed. POST v. LANGELL, 200.

Barber v. McCuaig (1900), 31 O.R. 593, applied and followed. RE DOTY AND MARKS, 623.

Barthelmes v. Bickell (1921), 62 Can. S.C.R. 599, followed. CUTTEN v. BICKELL, 113.

Bartholomew v. Freeman (1878), 3 C.P.D. 316, followed. MUSSON v. HEAD, 38.

Bath's Case (1878), 8 Ch.D. 334, distinguished. BEACH v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, 603.

Beach v. Hydro-Electric Power Commission of Ontario (1924), 56 O.L.R. 35, affirmed. BEACH v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO, 603.

Benn v. Hawthorne (1924), 55 O.L.R. 393, reversed. BENN v. HAWTHORNE, 557.

Berlin, City of, and County Judge of the County of Waterloo, Re (1914), 33 O.L.R. 73, specially referred to. CAMPBELL FLOUR MILLS CO. LTD. v. CITY OF PETERBOROUGH, 459.

Boland v. Canadian National Railway Co. (1925), 56 O.L.R. 653, affirmed. BOLAND v. CANADIAN NATIONAL RAILWAY CO., 619.

Bolton Partners v. Lambert (1889), 41 Ch.D. 295, distinguished. GOODISON THRESHER CO. v. DOYLE, 300.

CASES—(Continued.)

Bowden Wire Ltd. v. Bowden Brake Co. Ltd. (1912-14), 30 R.P.C. 45, 580, 31 R.P.C. 385, referred to. *FROST STEEL AND WIRE Co. v. LUNDY*, 494.

Bragg v. Oram (1919), 46 O.L.R. 312, explained and distinguished. *DOMINION LOOSE LEAF CO. LTD. v. MANUEL*, 84.

Brewster v. Kitchin (1698), *Comberbach* 424, referred to. *RE HAZELL*, 290.

Britton v. Milsom (1892), 19 A.R. 96, followed. *BANK OF TORONTO v. BENNETT*, 326.

Brock v. Crawford (1908), 11 O.W.R. 143, referred to. *LEFTLEY v. MOFFAT*, 260.

Brown v. Sewell (1880), 16 Ch.D. 517, followed. *ORPEN v. ATTORNEY - GENERAL FOR ONTARIO*, 164.

Brown v. Wood (1887), 12 P.R. 198, approved. *WILSON v. KINNEAR*, 679.

Burson v. German Union Insurance Co. (1905), 10 O.L.R. 238, referred to. *AMERICAN FOOTWEAR CO. v. LANCASHIRE AND GENERAL ASSURANCE CO.*, 305.

Canada Central Railway Co. v. The Queen (1873), 20 Gr. 273, explained and distinguished. *FITZPATRICK v. THE KING*, 178.

Canadian Pacific Railway Co. v. Fleming (1893), 22 Can. S.C.R. 33, followed. *IMERSON v. NIPISSING CENTRAL RAILWAY CO.*, 588.

Cavalier v. Pope, [1906] A.C.

CASES—(Continued.)

428, followed. *WESTENFELDER v. HOBBS MANUFACTURING CO. LTD.*, 31.

Chandler v. Gibson (1901), 2 O.L.R. 442, specially referred to. *RE HAIG*, 129.

City Equitable Fire Insurance Co. Ltd., In re (1924), 40 Times L.R. 664, 853, applied. *REX v. CLARENCE F. SMITH*, 383. Specially referred to. *REX v. BARNARD*, 397.

Clarke v. The Queen (1886), 1 Can. Ex. C.R. 182, followed. *FITZPATRICK v. THE KING*, 178.

Cowen, Ex p. (1867), L.R. 2 Ch. 563, referred to. *M. J. O'BRIEN LTD. v. BRITISH AMERICA NICKEL CORPORATION LTD. AND NATIONAL TRUST CO. LTD.*, 536.

Crombie v. The King (1922), 52 O.L.R. 72, followed. *FITZPATRICK v. THE KING*, 178.

Dakin (H.) & Co. Ltd. v. Lee, [1916] 1 K.B. 566, specially referred to. *MCGREGOR AND MCINTYRE CO. LTD. v. STERLING APPRAISAL CO. LTD.*, 485.

DeVault v. Robinson (1920), 48 O.L.R. 34, referred to. *BABBITT v. CLARKE*, 60.

Disney v. Howich (1925), 56 O.L.R. 606, reversed. *DISNEY v. HOWICH*, 365.

Dombey & Son Ltd. v. Playfair Brothers, [1897] 1 Q.B. 368, applied and followed. *RE DOTY AND MARKS*, 623.

Dovey v. Cory, [1901] A.C. 477, applied. *REX v. CLARENCE F. SMITH*, 383. Specially referred to. *REX v. BARNARD*, 397.

CASES—(Continued.)

Doyle v. McKinnon (1924), 56 O.L.R. 298, affirmed. *DOYLE v. MCKINNON*, 104.

Drew v. Martin (1864), 2 H. & M. 130, referred to. *RE GIFFEN*, 634.

Duckworth and Skinkle, Re (1924), 55 O.L.R. 272, followed. *RE BROWN AND ARGUE*, 297.

Dworkin v. Globe Indemnity Co. of Canada (1921), 51 O.L.R. 159, applied. *HOLDAWAY v. BRITISH CROWN ASSURANCE CORPORATION LTD.*, 70.

Eddy v. Eddy (1898), *Coutlée's Digest*, p. 130, followed. *POST v. LANGELL*, 200.

Evans v. Davies, [1893] 2 Ch. 216, followed. *MUSSON v. HEAD*, 38.

Filby v. Hounsell, [1896] 2 Ch. 737, applied and followed. *MUSSON v. HEAD*, 38.

Flexlume Sign Co. v. Macey Sign Co. (1922), 51 O.L.R. 595, followed. *FITZPATRICK v. THE KING*, 178.

Gardiner, In re (1887), 20 Q. B.D. 249, 58 L.T.R. 119, followed. *RE STONE*, 640.

General Billposting Co. Ltd. v. Atkinson, [1909] A.C. 118, applied and followed. *DEACON v. CREHAN*, 597.

Gillett (E. W.) & Co. v. Lumsden, [1905], A.C. 601, followed. *POST v. LANGELL*, 200.

Godfrey v. Cooper (1920), 46 O.L.R. 565, referred to. *JAMES v. CITY OF TORONTO*, 322.

Goodman and Attorney-General for Canada v. Bank of To-

CASES—(Continued.)

ronto (1924), 56 O.L.R. 318, affirmed. *GOODMAN AND ATTORNEY-GENERAL FOR CANADA v. BANK OF TORONTO*, 109.

Gordon v. Gordon, [1903] P. 151, followed. *RE BROWN AND ARGUE*, 297.

Goulding v. Wharton Saltworks Co. (1876), 1 Q.B.D. 374, referred to. *STONE v. KOHEN*, 579.

Grant v. Fuller (1902), 33 Can. S.C.R. 34, specially referred to. *RE HAIG*, 129.

Griffith v. Brown (1880), 5 A. R. 303, distinguished. *BABBITT v. CLARKE*, 60.

Hamilton v. Lethbridge (1912), 14 C.L.R. (Australia) 236, specially referred to. *DEACON v. CREHAN*, 597.

Handley v. Archibald (1899), 30 Can. S.C.R. 130, 137, referred to. *BABBITT v. CLARKE*, 60.

Hanson, Ex p. (1806-11), 12 Ves. 346, 18 Ves. 232, applied and followed. *CLARKSON v. SMITH & GOLDBERG*, 281.

Harnwell v. Parry Sound Lumber Co. (1897), 24 A.R. 110, applied and followed. *DEACON v. CREHAN*, 597.

Harris v. Gallimore (1924), 55 O.L.R. 566, varied on appeal. *HARRIS v. GALLIMORE*, 673.

Hazell, Re (1925), 57 O.L.R. 166, affirmed in part. *RE HAZELL*, 290.

Heilbut Symons & Co. v. Buckleton, [1913] A.C. 30, applied. *BENN v. HAWTHORNE*, 557.

CASES—(Continued.)

Heller v. Niagara Racing Association (1924), 56 O.L.R. 355, followed. *CURRY v. FARRELL*, 451.

Hewson v. Macdonald (1882), 32 U.C.C.P. 407, followed. *MILES v. ONTARIO EQUITABLE LIFE INSURANCE Co.*, 343.

Hodgson, Re (1921), 50 O.L.R. 531, followed. *MATHEWS v. NATIONAL TRUST Co. LTD.*, 657.

Holdaway v. British Crown Assurance Corporation Ltd. (1924), 56 O.L.R. 235, reversed. *HOLD-AWAY v. BRITISH CROWN ASSURANCE CORPORATION LTD.*, 70.

Hood v. Caldwell (1922), 50 O.L.R. 384, [1923] S.C.R. 488, followed. *TORONTO FINANCE CORPORATION LTD. AND COOK v. BANKING SERVICE CORPORATION LTD.*, 514.

Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317, followed. *MILNE v. DURHAM HOSIERY MILLS LTD.*, 228.

Indermaur v. Dames (1866-7), L.R. 1 C.P. 274, L.R. 2 C.P. 311, applied. *WESTENFELDER v. HOBBS MANUFACTURING Co. LTD.*, 31. Distinguished. *CONNOR v. CORNELL*, 35.

Johnson, Ex p. (1875), 6 P.R. 225, followed. *RE STAIR AND YOLLES*, 338.

Johnson, Ex p., In re Chapman (1884), 26 Ch. D. 338, followed. *DENISON v. UNION BANK OF CANADA*, 374.

Jones & Son v. Whitehouse, [1918] 2 K.B. 61, considered. *ARNOLDI v. TREMAINE*, 310.

Keates v. Woodward, [1902]

CASES—(Continued.)

1 K.B. 532, applied. *DOMINION LOOSE LEAF Co. LTD. v. MANUEL*, 84.

Lake Erie and Detroit River Railway Co. v. Sales (1896), 26 Can. S.C.R. 663, distinguished. *AMERICAN FOOTWEAR Co. v. LANCASHIRE AND GENERAL ASSURANCE Co.*, 305.

Lanier v. Rex, [1914] A.C. 221, 24 Cox C.C. 53, referred to. *REX v. BARNARD*, 397.

Larocque v. Landry (1922), 52 O.L.R. 479, followed. *ROBINS v. NATIONAL TRUST Co.*, 46.

Lawlor v. Lawlor (1882), 10 Can. S.C.R. 194, referred to. *RE HAZELL*, 290.

Liverpool and London and Globe Insurance Co. v. Agricultural Savings and Loan Co. (1903), 33 Can. S.C.R. 94, referred to. *LONDON LOAN AND SAVINGS Co. OF CANADA LTD. v. UNION INSURANCE Co. OF CANTON LTD.*, 651.

London Loan and Savings Co. of Canada Ltd. v. Union Insurance Co. of Canton Ltd. (1925), 56 O.L.R. 590, affirmed. *LONDON LOAN AND SAVINGS Co. OF CANADA LTD. v. UNION INSURANCE Co. OF CANTON LTD.*, 651.

Lucy v. Bawden, [1914] 2 K.B. 318, followed. *WESTENFELDER v. HOBBS MANUFACTURING Co. LTD.*, 31.

McConaghy v. Denmark (1880), 4 Can. S.C.R. 609, followed. *LEDYARD v. CHASE*, 268.

McEacharn, Re (1911), 103 L.T.R. 900, not followed. *RE GAMBLE*, 504.

CASES—(Continued.)

McGregor v. Norton, Re (1889), 13 P.R. 223, approved. *RE ORR V. KREPSKY*, 353.

McIntyre v. Stockdale (1912), 27 O.L.R. 460, followed. *LEFTLEY V. MOFFAT*, 260.

McLeod v. City of Windsor (1922), 52 O.L.R. 562, [1923] S.C.R. 696, referred to. *RE MCLEOD AND CITY OF WINDSOR*, 15.

McMichael v. Wilkie (1891), 18 A.R. 464, distinguished. *DISNEY V. HOWICH*, 365.

Maundrell v. Maundrell (1805), 10 Ves. 246, followed. *RE HAZELL*, 166.

Measures Brothers Ltd. v. Measures, [1910] 1 Ch. 336, [1910] 2 Ch. 248, applied and followed. *DEACON V. CREHAN*, 597.

Mersey Docks and Harbour Board v. Procter, [1923] A.C. 253, followed. *CONNOR V. CORNELL*, 35.

Montreuil v. Ontario Asphalt Block Co. Ltd. (1920), 48 O.L.R. 18, not followed. *POST V. LANGELL*, 200.

Moody v. Canadian Bank of Commerce (1891), 14 P.R. 258, followed. *KOHEN V. CULLEY BREAY & DOVER LTD.*, 533.

Morris (Herbert) Ltd. v. Saxelby, [1916] 1 A.C. 688, distinguished. *DEACON V. CREHAN*, 597.

Mutual Life Insurance Co. of New York v. Ontario Metal Products Co. (1924), 41 Times L.R. 183, [1925] A.C. 314, applied. *HOLDAWAY V. BRITISH CROWN*

CASES—(Continued.)

ASSURANCE CORPORATION LTD., 70.

Newton, Ex p. (1849), 3 DeG. & Sm., 584, not followed. *RE BRYANT ISARD & Co.*, 471.

Noble (John) & Son, Re (1924), 5 C.B.R. 147, 27 O.W.N. 107, approved. *RE CLUFF BROTHERS*, 662.

Noble Scott Ltd. v. Murray (1925), 56 O.L.R. 595, affirmed. *NOBLE SCOTT LTD. V. MURRAY*, 248.

Nordenfeldt v. Maxim Nordenfeldt Guns and Ammunition Co., [1894] A.C. 535, followed. *DEACON V. CREHAN*, 597.

North-West Transportation Co. v. Beatty (1887), 12 App. Cas. 589, referred to. *M. J. O'BRIEN LTD. V. BRITISH AMERICA NICKEL CORPORATION LTD. AND NATIONAL TRUST CO. LTD.*, 536.

Oakes v. Turquand (1867), L. R. 2 H.L. 325, referred to. *MILNE V. DURHAM HOSIERY MILLS LTD.*, 228.

Ooregum Gold Mining Co. of India v. Roper, [1892] A.C. 124, applied. *TORONTO FINANCE CORPORATION LTD. AND COOK V. BANKING SERVICE CORPORATION LTD.*, 514.

Orr v. Orr (1874), 21 Gr. 397, applied. *BENN V. HAWTHORNE*, 557.

Ottawa, City of, v. Keefer (1923), 54 O.L.R. 86, followed. *RE FOX AND CITY OF WINDSOR*, 243.

Payne v. Newberry (1890), 13 P.R. 392, explained. *RE DOTY AND MARKS*, 623.

CASES—(Continued.)

Phillips and Canadian Order of Chosen Friends, Re (1906), 12 O.L.R. 48, considered. BENNETT v. PEATTIE, 233.

Prefontaine v. Grenier, [1907] A.C. 101, specially referred to. REX v. BARNARD, 397.

Rabey v. Gilbert (1861), 30 L. J. Ex. 170, followed. BANK OF TORONTO v. BENNETT, 326.

Ray v. Pung (1822), 5 B. & Ald. 561, followed. RE HAZELL, 290.

Ray v. Willson (1911), 45 Can. S.C.R. 401, 421, referred to. IMPERIAL BANK OF CANADA v. DENNIS, 203.

Reid, Re (1921), 50 O.L.R. 595, followed. MATHEWS v. NATIONAL TRUST CO. LTD., 657.

Rex v. Baugh (1917), 38 O.L.R. 559, specially referred to. REX v. WEST, 446.

Rex v. Brinkley (1907), 14 O.L.R. 434, 446, 447, referred to. REX v. BARNARD, 397.

Rex v. Governor of Pentonville Prison (1903), 67 J.P. 206, followed. REX v. CHOMIK, 334.

Rex v. Hill (1911), 7 Cr. App. R. 1, specially referred to. REX v. WEST, 446.

Rex v. Lee Kun, [1916] 1 K.B. 337, referred to. RE ORR v. KREPSKY, 353.

Rex v. Ping Yuen (1921), 65 D.L.R. 722, referred to. REX v. BARNARD, 397.

Rex v. Robinson (1907), 14 O. L.R. 519, distinguished. REX v. CHOMIK, 334.

Rex v. Starkie (1921), 16 Cr.

CASES—(Continued.)

App. R. 61, specially referred to. REX v. WEST, 446.

Rex v. Taylor (1906), 12 Can. Crim. Cas. 244, distinguished. REX v. CHOMIK, 334.

Robinson v. Osborne (1912), 27 O.L.R. 248, referred to. BABBITT v. CLARKE, 60.

Ruffey - Arnell and Baumann Aviation Co. v. The King, [1922] 1 K.B. 599, 600, followed. FITZPATRICK v. THE KING, 178.

Russell v. Russell, [1924] A.C. 687, followed. RE BROWN AND ARGUE, 297.

Sanderson v. Burdett (1869), 16 Gr. 119, followed. LEFTLEY v. MOFFAT, 260.

Sandwich East, Township of, v. Union Natural Gas Co. (1924), 56 O.L.R. 399, affirmed. TOWNSHIP OF SANDWICH EAST v. UNION NATURAL GAS CO., 656.

Scamen v. Canadian Northern Railway Co., In re (1912), 6 D. L.R. 142, not followed. BUTT-RUM v. UDELL, 97.

Scarff v. Jardine (1882), 7 App. Cas. 345, distinguished. HUFFMAN v. ROSS, 329.

Scottish Petroleum Co., In re (1883), 23 Ch.D. 413, referred to. MILNE v. DURHAM HOSIERY MILLS LTD., 228.

Seddon v. Smith (1877), 36 L.T.R. 168, followed. BABBITT v. CLARKE, 60.

Shatford v. Foley Gold Mines Co. Ltd. (1924), 56 O.L.R. 230, affirmed. SHATFORD v. FOLEY GOLD MINES CO. LTD., 221.

Sherren v. Pearson (1887), 14

CASES—(Continued.)

Can. S.C.R. 581, followed. LED-YARD v. CHASE, 268.

Sievert, Re (1921), 51 O.L.R. 305, referred to. SEYMOUR v. PRATT, 278.

Small v. Thompson (1897), 28 Can. S.C.R. 219, followed. DISNEY v. HOWICH, 365.

Solicitors, Re (1912), 27 O.L.R. 147, followed. ORPEN v. ATTORNEY-GENERAL FOR ONTARIO, 164.

Spellman and Litovitz, Re (1918), 44 O.L.R. 30, 32, referred to. RE STAIR AND YOLLES, 338.

Stewart v. Stewart (1924), 56 O.L.R. 57, followed. DOYLE v. DEADY, 44.

Stiles v. Ecclestone, [1903] 1 K.B. 544, applied. DOMINION LOOSE LEAF CO. LTD. v. MANUEL, 84.

Storer & Co. v. Johnson (1890), 15 App. Cas. 203, followed. ARNOLDI v. TREMAINE, 310.

Thompson v. Parish (1859), 5 C.B.N.S. 685, followed. KOHEN v. CULLEY BREAY & DOVER LTD., 533.

Throckmorton v. Crowley (1866), L.R. 3 Eq. 196, followed. KOHEN v. CULLEY BREAY & DOVER LTD., 533.

Toronto Hockey Club v. Arena Gardens of Toronto Ltd. (1924), 55 O.L.R. 509, affirmed. TORONTO HOCKEY CLUB v. ARENA GARDENS OF TORONTO LTD., 610.

Trimble v. Hill (1879), 5 App. Cas. 342, followed. REX v. CHOMIK, 334.

CASES—(Continued.)

Wakefield v. Wakefield (1901), 2 O.L.R. 33, followed. RE KING, 144.

Walker, Re (1925), 56 O.L.R. 517, followed. RE MOORE, 530.

Walker v. Midland Railway Co. (1886), 2 Times L.R. 450, followed. CONNOR v. CORNELL, 35.

Waring v. Ward (1802), 7 Ves. 332, 337, applied and followed. DISNEY v. HOWICH, 365.

Wild's Case (1599), 6 Rep. 16b, applied and followed. RE HAIG, 129.

Wojcik v. Anthes Foundry Co. Ltd. (1925), 56 O.L.R. 600, affirmed. WOJCIK v. ANTHERS FOUNDRY CO., 286.

Worthing v. Robbins and Cadigan (1924), 56 O.L.R. 285, doubted. ALLEN v. PATTERSON, 287.

CERTIFICATE OF JUDGE.

See DIVISION COURTS.

CERTIFICATE OF RECORD.

See MINES AND MINING.

CHARGE ON ESTATE.

See BANKRUPTCY, 4—WILL, 5.

CHILDREN OF UNMARRIED PARENTS ACT.

See ILLEGITIMACY.

COLLEGE OF DENTISTRY.

See DENTIST.

COMMISSION OF AGENT.

See SALE OF GOODS, 2.

COMPANY.

1. *Action against, for Damages for Deceit—Subscription for Shares Induced by Fraudulent Representations of Agent of Company—Election to Retain Shares—Action not Maintainable—Action not Brought until after Voluntary Winding-up of Company Commenced—Whether Action for Rescission of Subscription Maintainable—Insolvency.*

MILNE V. DURHAM HOSIERY MILLS LTD., 228.

2. *Action against, for Wages—Defences—Release—Authority of Person Executing—Estoppel—Limitations Act—Acknowledgment.*

SHATFORD V. FOLEY MINES CO. LTD., 221.

3. *First Mortgage Bonds—Change in Security by Scheme Carried out by Company—Approval of Scheme—Votes of Bondholders—Protection of Security—Bona Fides—Interests of Class of Bondholders—Minority Rights—Power to Consent to Prior Charge—Delegation of Powers to Committee—Ultra Vires.*

M. J. O'BRIEN LTD. V. BRITISH AMERICA NICKEL CORPORATION LTD. AND NATIONAL TRUST CO. LTD., 536.

4. *Issue of Common Shares to Promoter as Paid-up Shares—Issue at a Discount—Consideration—Services to be Performed—Inadequacy—Contract Made with Provisional Directors—Rati-*

COMPANY—(Continued.)

fication by Permanent Directors and Shareholders—Judgment Declaring Contract ultra Vires—Release of Promoters from Performance of Services—Joinder of Shareholder as Co-plaintiff with Company—Unnecessary Party—Costs.

TORONTO FINANCE CORPORATION LTD. AND COOK V. BANKING SERVICE CORPORATION LTD., 514.

5. *Promissory Notes Made by Subscriber for Shares—Transfer and Endorsement by Company to Bank as Security for Loan—Validity of Endorsement—Signatures of Secretary-Treasurer and Managing Director—Ostensible Authority—Holder in Due Course—Bills of Exchange Act, secs. 2(d), (g), 21(3), 31, 56, 60, 74—Negotiation of Notes—Claims by Makers against Company and Officers Brought in as Third Parties—Promises—Misrepresentations—Authority—Absence of Consideration—Allotment of Shares—Instrument Signed in Blank—Authority to Fill up—Judgment against Makers—Right of Indemnity (except in Case of Maker-director) against Company and Managing Director.*

IMPERIAL BANK OF CANADA V. DENNIS, 203.

See BANKRUPTCY, 4.

CONDITIONAL SALE.

See FIXTURES—SALE OF GOODS, 2.

CONDONATION.

See MASTER AND SERVANT.

CONSENT.

See ARBITRATION AND AWARD
—LANDLORD AND TENANT, 2.

CONSTITUTIONAL LAW.

1. *Natural Gas Conservation Acts, 1921 and 1922—Powers of Board of Reference.*

TOWNSHIP OF SANDWICH
EAST V. UNION NATURAL GAS
Co., 656.

2. *Provincial Taxation—Whether Indirect—British North America Act, sec. 92(2)—Assessment of Trustee in Respect of Income of Estate—Tax to be Paid by Trustee, but Ultimately to be Borne by Beneficiaries—Assessment Act, secs. 2(ka), 13(3) and (4), Added by 12 & 13 Geo. V. ch. 78, secs. 2, 12—Income of one Year Assessable in Following Year.*

RE MCLEOD AND CITY OF
WINDSOR, 15.

See MARRIAGE.

CONTRACT.

1. *Employment of Expert to Make Appraisal of Buildings and Machinery for Fixed Fee—Report—Defects or Errors in two Branches—Payments on Account of Fee—Retention of Report—Expert Entitled to Payment—Damages in Respect of Defective Portions and Effect on whole Report—Appeal—Costs.*

MCGREGOR AND MCINTYRE Co.
LTD. V. STERLING APPRAISAL Co.
LTD., 485.

CONTRACT—(Continued.)

2. *Guaranty—Statute of Frauds—Findings of Trial Judge—Appeal.*

DOYLE V. MCKINNON, 104.

3. *Written Offer (not under Seal) to Buy Machine—Withdrawal before Acceptance—Attempted Acceptance after Withdrawal—Exclusion of Agent's Authority to Contract—Impossibility of Ratification.*

GOODISON THRESHER Co. V.
DOYLE, 300.

See BANKRUPTCY, 6—COMPANY, 4—CROWN—DAMAGES—DEED—INSURANCE—LANDLORD AND TENANT, 1—SALE OF GOODS—WILL, 8.

CONTRACT OF HIRING.

See MASTER AND SERVANT.

CONTRIBUTORIES.

See BANKS AND BANKING.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 1.

CONTRIBUTORY NEGLIGENCE ACT.

See NEGLIGENCE, 1.

CONVEYANCE TO USES.

See DOWER.

CONVICTION.

See CRIMINAL LAW.

CORROBORATION.

See WILL, 2, 8.

COSTS.

1. *Scale of Costs—Taxation—Action Brought in Supreme Court of Ontario—Claim for Injunction and Damages—Amount of Damages not Specified—Injunction Granted but no Damages—Jurisdiction of County Courts—County Courts Act, R.S.O. 1914, ch. 59, sec. 22(1) (i)—Rule 649—"Order to the Contrary" not Sought at Trial—Inquiry as to Sum or Value Involved.*

DOMINION LOOSE LEAF CO. LTD. v. MANUEL, 84.

2. *Taxation of Costs—Counsel-fee on Argument of Appeal—Quantum—Appeal from Decision of Taxing Officer—Length of Argument.*

ORPEN v. ATTORNEY-GENERAL FOR ONTARIO, 164.

See BROKERS—COMPANY, 4—
CONTRACT, 1—COVENANT, 2—
EXECUTORS AND ADMINISTRATORS, 1—FIXTURES—HUSBAND AND WIFE—SALE OF GOODS, 2—
SOLICITOR—SURVIVORSHIP—
WILL, 1.

COUNSEL.

See LIBEL.

COUNSEL-FEES.

See COSTS, 2.

COUNTY COURTS.

See COSTS, 1.

COURTS.

See APPEAL—COSTS, 1—DIVISION COURTS.

COVENANT.

1. *Building Restriction—Conveyancing and Law of Property Act, sec. 57 (12 & 13 Geo. V. ch. 53, sec. 2)—Application to Isolated Restriction—"Beneficial to the Persons Principally Concerned."*

RE BUTTON, 161.

2. *Restriction as to Use of Land Sold—Action to Enforce—Interest of Plaintiff—Ownership of other Land—Use of Land for Purposes other than Residential—Interpretation of Covenant—Whether Successor in Title of Covenantor Bound—"Assigns" not Mentioned—Notice and Knowledge—Equitable Right—Acquiescence—Estoppel—Declaration—Injunction—Costs.*

BESINNETT v. WHITE, 171.

See DEED—MASTER AND SERVANT.

CREDITORS.

See BANKRUPTCY.

CRIMINAL LAW.

1. *Director of Bank—Conviction for Negligently Approving of or Concurring in False Statement or Return Made to Minister of Finance—Bank Act, 1913, sec. 153(3)—Return Required by sec. 54—"Outgoing Directors"—Board of Directors—Absence of Actual Knowledge of Falsity—Failure to Attend Meetings of Board—Absence of Dishonesty—Reliance on Officers of Bank as to Correctness of Return.*

REX v. CLARENCE F. SMITH, 383.

CRIMINAL LAW—(Con.)

2. *Director of Bank—Offences against Bank Act, 1913, sec. 153—False Statements in Annual Return to Minister of Finance—Using False Statement—Negligent Approval of or Concurrence in—Knowledge of Director—Evidence—Absence from Directors' and Shareholders' Meetings—Proxy—Duty of Director—Mens Rea—Meaning of "Negligently" in subsec. 2—Individual Responsibility of Director for Return.*

REX V. BARNARD, 397.

3. *Director of Bank—Offences against Bank Act, 1913, sec. 153—Making, Using, or Concurring in False Monthly and Annual Returns to Minister of Finance—Secs. 54 and 112 of Act—Schedule D.—Form of Declaration—Correctness of Monthly Return according to Books of Bank—Belief of Director in Correctness—"Condition of the Bank"—"Financial Position of the Bank"—"Knowledge and Belief"—Evidence as to Annual Return—Absence of Defendant—Knowledge—Inference—Onus—Negligence—Reliance on Information Given by Officers.*

REX V. GOUGH, 426.

4. *Magistrate's Conviction for Offence against Inland Revenue Act, R.S.C. 1906, ch. 51, sec. 180 (f)—Keeping or Allowing to be Kept Distilling Apparatus in Place Described in Conviction—Omission of Statement that Place "Owned or Controlled" by Accused—Conviction Defective—*

CRIMINAL LAW—(Con.)

Amendment not Warranted by Evidence—Conviction Quashed—Whether Further Prosecution Open.

REX V. BUSCH, 248.

5. *Magistrate's Conviction for Offence against Ontario Temperance Act—Sentence of Imprisonment—Arrest on Magistrate's Warrant—Release on Bail pending Appeal from Conviction—Re-arrest on same Warrant after Dismissal of Appeal—Warrant Exhausted—Discharge on Habeas Corpus—Criminal Code, sec. 756—Construction of—Authority of English Decision—Time during which Defendant at Large upon Bail not Reckoned as Part of Term of Imprisonment.*

REX V. CHOMIK, 334.

6. *Rape—Trial—Conviction—Appeal—Criminal Code, sec. 1014 (13 & 14 Geo. V. ch. 41, sec. 9)—Trial Judge's Summing-up—Miscarriage of Justice—New Trial.*

REX V. WEST, 446.

CROWN.

Petition of Right—Whether Suppliant Entitled to Patent for Crown Lands without Reservation of Water-rights—Fraud—Evasion of Regulations—Contract—Performance of Settlement Duties—Approval of Minister—Practice—Amendment—Parties—Absence of Jurisdiction in Court to Compel Crown to Issue Letters Patent—Petition of Right

CROWN—(Continued.)

*Act, R.S.O. 1877, ch. 59, sec. 2—
Judicature Act, R.S.O. 1897, ch.
51, sec. 26(7).*

FITZPATRICK v. THE KING,
178.

See REVENUE.

CUSTOMER.

See BROKERS — PARTNERSHIP
—REVENUE.

DAMAGES.

*Breach of Contract—Measure
of Damages—Evidence—Profits
—Selling Value of Undertaking.*

TORONTO HOCKEY CLUB v.
ARENA GARDENS OF TORONTO
LTD., 610.

See COSTS, 1—INSURANCE, 3—
LANDLORD AND TENANT, 2—
LIBEL—MASTER AND SERVANT—
NEGLIGENCE, 1—VENDOR AND
PURCHASER, 2.

DEATH.

See INSURANCE, 4, 5—RAIL-
WAY, 2—REVIVOR.

DEBENTURES.

See BANKRUPTCY, 4 — COM-
PANY, 3.

DECEIT.

See COMPANY, 1.

DEED.

*Delivery—Whether in Escrow
—Land Conveyed at Request of
Purchaser to himself and Wife as
Joint Tenants—Death of Pur-
chaser before Full Payment of
Purchase-price — Agreement —*

DEED—(Continued.)

*Covenant to Pay Purchase-money
—Gift—Presumption—Right of
Widow as Survivor—Payment of
Balance of Price out of Estate of
Husband.*

RE GIFFEN, 634.

See MORTGAGE, 2.

DEFAMATION.

See LIBEL.

DELEGATION.

See COMPANY, 3.

DENTIST.

*Suspension from Practice —
“Improper Conduct in a Profes-
sional Respect”—Dentistry Act,
R.S.O. 1914, ch. 163, sec. 27—
Advertising—Professional Ethics
—Powers of Board of Directors
of College—Finding of Discipline
Committee—Adoption by Board
—Appeal to Court.*

RE DAVIDSON AND ROYAL COL-
LEGE OF DENTAL SURGEONS OF
ONTARIO, 222.

DEVASTAVIT.

See EXECUTORS AND ADMINIS-
TRATORS, 1.

DEVISE.

See WILL.

DIRECTORS.

See CRIMINAL LAW, 1, 2, 3—
—COMPANY, 4, 5—DENTIST.

DISBURSEMENTS.

See BANKRUPTCY, 7.

DISCHARGE OF MORTGAGE.

See DOWER—MORTGAGE, 1, 3.

DISCIPLINE.

See DENTIST.

DISCOVERY OF NEW EVIDENCE.

See WILL, 2.

DISCRETION.

See EXECUTORS AND ADMINISTRATORS, 2—JUDGMENT—SOLICITOR—TRIAL—WILL, 2.

DISPUTE.

See MINES AND MINING.

DISQUALIFICATION.

See MUNICIPAL CORPORATIONS, 2.

DISTILLING.

See CRIMINAL LAW, 4.

DISTRESS.

See BANKRUPTCY, 3.

DIVISION OF TOWNSHIP.

See MUNICIPAL CORPORATIONS, 1.

DIVISION COURTS.

Jurisdiction — Person Substituted as Defendant for Defendant upon whom Summons Served—Amendment of Summons — Failure to Serve Amended Summons — Substituted Defendant not Appearing on Day Fixed for Trial — Judgment Entered against her as on Default—Motion to Division Court Judge to

DIVISION COURTS.—(Con.)

Set aside Refused—Motion then Made for Prohibition — Certificate of Division Court Judge not Settled in Presence of Parties—Evidence — Waiver — Irregularity—Division Courts Act, secs. 34, 85, 87, 97 (1), (4)—Division Court Rules 3, 37.

RE ORR V. KREPSKY, 353.

DOMINION RAILWAY COMPANY.

See NEGLIGENCE, 1.

DOWER.

Inchoate Right—Whether Defeated by Conveyance to Uses—Estate in Fee and Power of Appointment Subsisting in same Person—Appointment by Way of Mortgage—Whether Power thereby Exhausted—Estate Acquired—Effect of Registration of Discharge of Mortgage — Registry Act, R.S.O. 1914, ch. 124, sec. 67—Statute of Uses, 27 Hen. VIII. ch. 10—Dower Act, R.S.O. 1914, ch. 70, sec. 4—Feigned Issue.

RE HAZELL, 166, 290.

See WILL, 3.

ELECTION.

See COMPANY, 1 — MASTER AND SERVANT — PARTNERSHIP — WILL, 3.

ELECTIONS.

See MUNICIPAL CORPORATIONS, 2.

ELECTRICAL POWER.

See ARBITRATION AND AWARD — MUNICIPAL CORPORATIONS, 4.

ENCLOSURE.*See* LIMITATION OF ACTIONS, 2.**ENCROACHMENT.***See* LIMITATION OF ACTIONS, 2.**EQUITABLE OBLIGATION.***See* VENDOR AND PURCHASER, 3.**ESCROW.***See* DEED.**ESTATE.***See* DOWER—WILL.**ESTATE TAIL.***See* WILL, 5.**ESTOPPEL.***See* BANKRUPTCY, 4 — COMPANY, 2—COVENANT, 2—INSURANCE, 5—LIMITATION OF ACTIONS, 2—PARTNERSHIP.**EVICTIION.***See* LANDLORD AND TENANT, 2.**EVIDENCE.***“Opinion Evidence”—Limitation of Number of Expert Witnesses at Trial of Action—Ontario Evidence Act, sec. 10—Testimony of Professional Men—Special Knowledge — Witnesses Called upon Different Branches of Case.**BUTTRUM v. UDELL*, 97;
ROBINS v. NATIONAL TRUST Co., 46.*See* CRIMINAL LAW, 3—HUSBAND AND WIFE—ILLEGITIMACY**EVIDENCE—(Continued.)**

—LIBEL — MORTGAGE, 2—RAILWAY, 2—SALE OF GOODS, 3—SURVIVORSHIP—VENDOR AND PURCHASER, 1—WILL, 2, 7, 8.

EXAMINATION OF JUDGMENT DEBTOR.*See* JUDGMENT DEBTOR.**EXCHANGE (FOREIGN).***See* BROKERS.**EXCHANGE OF PROPERTIES.***See* VENDOR AND PURCHASER, 1, 3.**EXCISE TAX.***See* REVENUE.**EXECUTION.***See* BANKRUPTCY, 5.**EXECUTORS AND ADMINISTRATORS.**1. *Devastavit — Failure to Insure Buildings — Negligence — Liability—Appeal—Costs.**RE GAMBLE*, 504.2. *Executor and Trustee — Payment of Legacies—Discretion Given by Will as to Times of Payment and Withholding Payment —Discretion Unreasonably Exercised—Violation of Directions of Will—Powers of Executor where two Named in Will and Probate Granted to one only—Action for Legacy—Declaration that Legacy Improperly Withheld—Adminis-*

EXECUTORS AND ADMINISTRATORS—(Con.)

tration Order—Parties—Practice—Rule 608.

SEYMOUR V. PRATT, 278.

See BANKS AND BANKING—MORTGAGE, 3—WILL, 1, 8.

EXPERT APPRAISER.

See CONTRACT, 1.

EXPERT WITNESSES.

See EVIDENCE.

EXPROPRIATION.

See RAILWAY, 1.

FALSE RETURNS.

See CRIMINAL LAW, 1, 2, 3.

FARMER.

See SALE OF GOODS, 1.

FIRE INSURANCE.

See INSURANCE, 2, 3.

FIXTURES.

“Wall-beds” Installed in Building—Attachment in such a Way as to be Removable without Injury to Building—Beds Sold to Contractor for Building under Conditional Sale Contract—Conditional Sales Act, secs. 3, 9—“Goods”—“Household Furniture”—Right of Owner of Building to Retain Beds on Payment of Amount Due thereon—Costs.

MURPHY WALL BED CO. OF DETROIT V. LEVIN, 105.

FRAUD AND MISREPRESENTATION.

See COMPANY, 1, 5—CROWN—INSURANCE, 1—VENDOR AND PURCHASER, 3.

GIFT.

See DEED—WILL.

GUARANTY.

See CONTRACT, 2.

HABEAS CORPUS.

See CRIMINAL LAW, 5.

HIGHWAY.

See MUNICIPAL CORPORATIONS, 3.

HUSBAND AND WIFE.

Moneys Deposited by Husband in Banks to Credit of himself and Wife—Joint Tenancy—Right of Wife Surviving—Evidence—Presumption—Whether Rebutted by Facts and Circumstances—Affidavit Made and Cheques Signed by Wife after Death of Husband—Absence of Knowledge or Advice—Costs.

MATHEWS V. NATIONAL TRUST CO. LTD., 657.

See BANKRUPTCY, 5—DEED—ILLEGITIMACY—MARRIAGE—SURVIVORSHIP—VENDOR AND PURCHASER, 1, 3.

HYPOTHECATION.

See BANKRUPTCY, 2.

ILLEGALITY.

See INSURANCE, 2.

ILLEGITIMACY.

Child Borne by Married Woman—Evidence of Husband and Wife Tending to Bastardise Child—Inadmissibility—Presumption of Legitimacy—Evidence to Rebut—Possibility of Marital Inter-course—Admission of Adulterer Charged as Father of Child—Insufficiency—Children of Unmarried Parents Act, 1921, 11 Geo. V. ch. 54—"Child Born out of Wedlock."

RE BROWN AND ARGUE, 297.

INCHOATE RIGHT.

See DOWER.

INCOME ASSESSMENT.

See ASSESSMENT AND TAXES—CONSTITUTIONAL LAW, 2.

INDEMNITY.

See COMPANY, 5—INSURANCE—VENDOR AND PURCHASER, 3.

INJUNCTION.

See COSTS, 1—COVENANT, 2—MASTER AND SERVANT.

INLAND REVENUE ACT.

See CRIMINAL LAW, 4.

INSOLVENCY.

See BANKRUPTCY — COMPANY, 1.

INSURANCE.

1. *Automobile Insurance—Application Signed by Agent of Insurance Company without Written Authority of Assured—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 198d(1) (12 & 13*

INSURANCE—(Continued.)

Geo. V. ch. 61, sec. 14)—Non-compliance with—Policy Issued Relied on by Assured and Insurer—Disregard of Prohibition—Misrepresentations in Policy—Materiality—Sec. 155 of Principal Act—Contract Vitiating by Fraud.

HOLDAWAY v. BRITISH CROWN ASSURANCE CORPORATION LTD., 70.

2. *Fire Insurance—Action on Policy—Defence—Concurrent Insurance Clause—Meaning of—Failure of Concurrent Insurer to Pay—Reliance on Terms of Contract—Attempt of Insurers to Set up Invalidity of Contract—English Company not Licensed in Ontario—Failure to Prove—Pleading—Rules 142, 113—Amendment not Sought—Refusal to Consider Question of Validity—Illegal Contracts.*

AMERICAN FOOTWEAR CO. v. LANCASHIRE AND GENERAL ASSURANCE CO., 305.

3. *Fire Insurance—Loss Payable to Mortgagees—Policy Made Subject to Provisions of Mortgage Clause—Right of Mortgagees to Maintain Action in their own Name—Proofs of Loss, by whom to be Given—Dispensing with Proofs—Ontario Insurance Act, sec. 199—Change of Ownership—Failure to Notify Insurers—Effect of Mortgage Clause—Policy not Avoided—Damages for Breach of Obligation.*

LONDON LOAN AND SAVINGS CO. OF CANADA LTD. v. UNION

INSURANCE—(Continued.)

INSURANCE CO. OF CANTON LTD., 651.

4. *Life Insurance—Policy Issued to Employer upon Lives of Employees—Designation of Wife of Employee as Beneficiary — Preferred Beneficiary—Cesser of Employment—Notification to Insurance Company — Terms of Policy.*

WOJCIK V. ANTHERS FOUNDRY CO. LTD., 286.

5. *Life and Accident Insurance—Lapse of Policy by Failure to Pay Premium when Due—Reinstatement Conditional upon Good Health of Insured at Time of Payment of Premium—Insured Suffering from Infection which Caused Death shortly afterward—Double Indemnity in Event of Death from Accident — “ Event Insured against ”—Ontario Insurance Act, R.S.O. 1914, ch. 183, sec. 172(1)—Release — Validity—Estoppel.*

MILES V. ONTARIO EQUITABLE LIFE INSURANCE CO., 343.

See BANKRUPTCY, 2—EXECUTORS AND ADMINISTRATORS, 1—SURVIVORSHIP—WILL, 3.

INVITATION.

See NEGLIGENCE, 2, 3.

JOINT TENANCY.

See DEED — HUSBAND AND WIFE.

JUDGE'S CHARGE.

See CRIMINAL LAW, 6.

JUDGMENT.

Defendant not Appearing at Trial — Judgment for Plaintiffs by Default—Motion to Set aside —Rule 499—Delay in Moving—Discretion—Appeal.

STONE V. KOHEN, 579.

See VENDOR AND PURCHASER, 3.

JUDGMENT DEBTOR.

Examination of—Rules 580-584—Order for Examination of Persons to whom or for whose Benefit Payments Made by Debtor—Application for—Examination, for Use on Pending Motion, of Person whose Examination is Sought—Rule 228—Difficulty in or about Execution or Enforcement of Judgment—Disposition of Property of Debtor—Questions to be Put upon Examination—Practice.

BEAU MONDE LADIES' TAILORING CO. V. GARRETT, 256.

JUDICIAL COMMITTEE.

See APPEAL.

JURISDICTION.

See COSTS, 1 — DIVISION COURTS—WILL, 1.

JURY.

See NEGLIGENCE, 1, 2—RAILWAY, 2.

JURY NOTICE.

See TRIAL.

LAND.

See MUNICIPAL CORPORATIONS, 3.

LANDLORD AND TENANT.

1. *Lease of Part of Building with Use of Lift for Goods—Destruction of Lift by Fire—Injury to Business of Tenants—Rent—Implied Agreement to Maintain Service—Whether Lift Part of Demised Premises.*

NOBLE SCOTT LTD. v. MURRAY,
248.

2. *Lease of Premises for Coal-yard—Right of Tenant to Use of Railway Siding Owned by Railway Company — Necessity for Consent of Company—Duty of Landlord to Procure—Breach—Damages — Rent — Eviction — Continuance of Tenancy.*

CURRY v. FARRELL, 451.

3. *Overholding Tenant — Successive Applications for Possession under Landlord and Tenant Act, Part III.—Dismissal on Account of Irregularities in Procedure—Renewal on New Material Supplying Defects in Former Applications—Res Judicata—Notice to Quit—Subsequent Demand of Possession and Notice of Intention to Distrain—Sec. 34 of Act—Waiver.*

RE DOTY AND MARKS, 623.

See BANKRUPTCY, 3.

LEASE.

See LANDLORD AND TENANT.

LEGACIES.

See EXECUTORS AND ADMINISTRATORS, 2—WILL.

LIBEL.

Newspaper Report of Remarks of Counsel in Police Court Proceedings—Privilege—Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 11(1)—Evidence — Onus — Name of Plaintiff not Mentioned in Police Court but Given in Report—Report not “Fair and Accurate” — Objectionable Headlines—Absence of Actual Malice—Damages.

GEARY v. ALGER, 218.

LICENSE.

See INSURANCE, 2—MUNICIPAL CORPORATIONS, 3.

LIEN.

See MECHANICS’ LIENS.

LIFE-ESTATE.

See WILL, 7.

LIFE INSURANCE.

See INSURANCE, 4, 5—SURVIVORSHIP—WILL, 3.

LIMITATION OF ACTIONS.

1. *Title by Possession to Marshlands—Enclosure—Occupation—Pasturing of Cattle—Shooting and Trapping—Sporadic Acts of Trespass—Failure to Prove Possession or to Prove Exclusion of True Owner.*

LEDYARD v. CHASE, 268.

2. *Title by Possession to Strip of Land—Trespass — Encroachment—Enclosure—Adverse Possession — Evidence — Successive Trespassers without Interval—Absence of Express Conveyance*

LIMITATION OF ACTIONS

—(Continued.)

of Strip—Character of User—Whether as mere Way or Easement—Continuous, Uninterrupted, and Exclusive Possession for Statutory Period.

BABBITT V. CLARKE, 60.

See COMPANY, 2—REVIVOR—SALE OF GOODS, 1—SOLICITOR.

LIQUIDATED DAMAGES.

See MASTER AND SERVANT.

LIS PENDENS.

See VENDOR AND PURCHASER, 2.

LOAN AND TRUST CORPORATIONS ACT.

See TRUSTS AND TRUSTEES, 1.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 1.

MALICE.

See LIBEL.

MARRIAGE.

Declaration of Nullity—Marriage Act, R.S.O. 1914, ch. 148, secs. 15, 36—Amending Acts (1919) 9 Geo. V. ch. 35, secs. 2, 4, and (1921) 11 Geo. V. ch. 21—Requirements of—Non-compliance with—Invalid Ceremony—Authority of Celebrating Minister and Deputy Issuer of Licenses—Constitutional Law—Statutes Declared intra Vires.

DOYLE V. DEADY, 44.

MARRIED WOMAN.

See BANKRUPTCY, 5—ILLEGITIMACY—VENDOR AND PURCHASER, 3.

MARSH-LANDS.

See LIMITATION OF ACTIONS, 1.

MASTER AND SERVANT.

Employment of Physician as Assistant—Wrongful Dismissal—Alleged Injury to Patient—Failure to Shew Negligence or Want of Skill—Condonation—Contract—General Hiring—Dismissal without Notice—Reasonable Notice—Failure to Prove Damage—Nominal Damages—Covenant of Assistant not to Engage in Practice in Defined Area for Period after Termination of Contract—Reasonableness and Validity—Covenant not Enforceable—Repudiation by Wrongful Dismissal—Provision for Liquidated Damages—Injunction—Election.

DEACON V. CREHAN, 597.

See INSURANCE, 4.

MECHANICS' LIENS.

Claim of Lien—Validity—Affidavit—Mechanics and Wage-Earners Lien Act, 1923, sec. 18—Error Cured by sec. 19—Rights of Mortgagee—Priority over Lienholder—Limitation of—Sec. 8(3)—Actual Value of Land—Ascertainment—Finding of Master—Appeal.

MARTELLO V. BARNET, 670.

MENS REA.

See CRIMINAL LAW, 2.

MINES AND MINING.

Recorded Claim—Certificate of Record—Work Performed—False Affidavit—Restaking by Disputant—“Dispute”—Finality of Certificate—Remedy by Appeal Lost by Delay—Mining Act of Ontario, secs. 63(4), 133.

RE HEATH AND ROSE, 67.

MINORITY RIGHTS.

See COMPANY, 3.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MISTAKE.

See MUNICIPAL CORPORATIONS, 4.

MORTGAGE.

1. *Impossibility of Paying Mortgage-money and Obtaining Discharge—Refusal of Mortgagees to Receive Money—Right of Mortgagors to Pay—Mortgages Act, R.S.O. 1914, ch. 112, sec. 11, subsecs. 2, 3 (5 Geo. V. ch. 21, sec. 1)—“Or for some other Cause”—Ejusdem Generis Rule—Order for Payment into Court.*

RE OLLMANN, 340.

2. *Printed Form of Mortgage-deed—Construction of Clause Giving Mortgagor Privilege of Paying Additional Sums on Account of Principal on Days Fixed for Compulsory Payment of Instalments—Blank Space for*

MORTGAGE—(Continued.)

Amount not Filled in—Inadmissibility of Extrinsic Evidence—Rule 605.

RE DEMPSEY AND MIDLAND LOAN AND SAVINGS CO., 627.

3. *Statutory Discharge—Executor—Validity—Mortgages Act, R.S.O. 1887, ch. 102, sec. 13.*

RE STAIR AND YOLLES, 338.

See DOWER—INSURANCE, 3—MECHANICS’ LIENS—TRUSTS AND TRUSTEES, 2—VENDOR AND PURCHASER, 3.

MOTOR VEHICLES.

See MUNICIPAL CORPORATIONS, 3—RAILWAY, 2.

MUNICIPAL CORPORATIONS.

1. *Division of Township—Cost of Local Improvements—Matters in Dispute between New Townships—Determination by Ontario Railway and Municipal Board—Members of Board Acting as Arbitrators—Special Act 12 & 13 Geo. V. ch. 140, sec. 4(1)(a), (2)—Right to Submit Questions to Court—Questions of Law—Opinion of Board—Municipal Act—Ontario Railway and Municipal Board Act.*

RE TOWNSHIP OF YORK AND TOWNSHIP OF NORTH YORK, 644.

2. *Election of Person as Township Councillor—Disqualification—Membership in Rural Public School Board—Consolidated*

MUNICIPAL CORPORATIONS—(Continued.)

Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, sec. 53(1) (j).

REX EX REL. SCROGGIE v. ROBB, 23.

3. *Land Owned by City Corporation Adjacent to Travelled Highway—Dangerous Condition—Trap—Injury to Persons Travelling in Motor Vehicle—Liability of Corporation as Landowner—Vehicle Driven by Boy under 18 Years not Licensed under Motor Vehicles Act—Sec. 13 of Act as Enacted by 7 Geo. V. ch. 49, sec. 10—Whether Vehicle Trespasser upon Highway—Statutory Liability to Repair.*

JAMES v. CITY OF TORONTO, 322.

4. *Resolution of City Council—Inquiry into Alleged Mistakes Made in Charges for Electrical Power by Public Utilities Commission—Separate Statutory Body—Part of Public Business of Municipality—Municipal Act, R.S.O. 1914, ch. 192, sec. 248—Water Commissioners—General and Special Statutes.*

CAMPBELL FLOUR MILLS CO. LTD. v. CITY OF PETERBOROUGH, 458.

MUNICIPAL ELECTIONS.

See MUNICIPAL CORPORATIONS, 2.

MUTUAL WILLS.

See WILL, 8.

NATURAL GAS CONSERVATION ACTS.

See CONSTITUTIONAL LAW, 1.

NEGLIGENCE.

1. *Dominion Railway Company—Electric Car Running on Company's own Strip of Land—Injury to Person Standing near Tracks at Stopping Place—Speed of Car—Weather Conditions and Circumstances—Evidence—Findings of Jury—Judge's Charge—Questions whether Injured Person a Trespasser in Effect Passed upon—Necessity for New Trial Avoided—Judicature Act, sec. 28—Absence of Statutory Limitation of Rate of Speed—Common Law Obligation—Reasonable Care—Contributory Negligence—Apportionment of Damages—Contributory Negligence Act, 1924.*

IMERSON v. NIPISSING CENTRAL RAILWAY CO., 588.

2. *Injury to Invitee in Warehouse—Findings of Jury—Negligence Charged but not Found Considered to be Negated—Negligence Found not Justifying Judgment in Favour of Injured Person—Evidence—Danger Known to Injured Person—Scienti non Fit Injuria.*

WESTENFELDER v. HOBBS MANUFACTURING CO. LTD., 31.

3. *Injury to Invitee in Warehouse—Trap—Unusual Danger—Limited Invitation—Qualified Liability.*

CONNOR v. CORNELL, 35.

See CRIMINAL LAW, 1, 2, 3—EXECUTORS AND ADMINISTRATORS, 1.

NEW TRIAL.

See CRIMINAL LAW, 6—NEGLIGENCE, 1—WILL, 2.

NEWSPAPER.

See LIBEL.

NOTICE.

See COVENANT, 2 — MASTER AND SERVANT— PARTNERSHIP — PROMISSORY NOTES — SALE OF GOODS, 3.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 3.

NULLITY.

See ARBITRATION AND AWARD—MARRIAGE.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

See MUNICIPAL CORPORATIONS, 1.

ONTARIO TEMPERANCE ACT.

See CRIMINAL LAW, 5.

ONUS.

See CRIMINAL LAW, 3—LIBEL—WILL, 2, 8.

OPINION EVIDENCE.

See EVIDENCE—WILL, 2.

OVERHOLDING TENANT.

See LANDLORD AND TENANT, 3.

PARENT AND CHILD.

See WILL, 8.

PARTIES.

See COMPANY, 4—CROWN—DIVISION COURTS — EXECUTORS AND ADMINISTRATORS, 2—INSURANCE, 3 — VENDOR AND PURCHASER, 2.

PARTNERSHIP.

Firm of Stockbrokers—Retirement of one Member of Firm—Continuance of Business by Remaining Member in Firm Name—Bankruptcy—Claim Made by Customer upon Bankrupt Estate in Respect of Dealings after Retirement — Whether Amounting to Election—Attempt to Hold Retired Partner Liable—Estoppel — Implied Representation — Knowledge of Untruth—Notice to Customer, whether Necessary.

HUFFMAN v. ROSS, 329.

See BANKRUPTCY, 1, 7—SET-OFF.

PASSENGER.

See RAILWAY, 2.

PATENT FOR LAND.

See CROWN.

PAYMENT INTO COURT.

See MORTGAGE, 6.

PETITION OF RIGHT.

See CROWN.

PHYSICIAN.

See MASTER AND SERVANT.

PLEADING.

See INSURANCE, 2.

PLEDGE.

See BANKRUPTCY, 2—SET-OFF.

POLICE COURT.

See LIBEL.

POSSESSION.

See LIMITATION OF ACTIONS.

POWER COMMISSION.

See ARBITRATION AND AWARD.

POWER OF APPOINTMENT.

See DOWER—WILL, 7.

PRACTICE.

See APPEAL—COSTS — CROWN
—DIVISION COURTS—EXECUTORS
AND ADMINISTRATORS, 2—JUDG-
MENT — JUDGMENT DEBTOR —
LANDLORD AND TENANT, 3—RE-
VIVOR — SALE OF GOODS, 2 —
TRIAL — VENDOR AND PUR-
CHASER, 1, 2.

PREFERRED BENEFICIARY.

See INSURANCE, 4.

PRESERVATION OF PROPERTY PENDENTE LITE.

See VENDOR AND PURCHASER,
1.

PRESUMPTION.

See DEED — HUSBAND AND
WIFE — ILLEGITIMACY—SALE OF
GOODS, 3—SURVIVORSHIP.

PRINCIPAL AND AGENT.

See CONTRACT, 3—SALE OF
GOODS, 2, 3.

PRIORITIES.

See BANKRUPTCY, 3 — ME-
CHANICS' LIENS.

PRIVILEGE.

See LIBEL—MORTGAGE, 2.

PRIVY COUNCIL.

See APPEAL.

PROFESSIONAL ETHICS.

See DENTIST.

PROFITS.

See BROKERS—DAMAGES.

PROHIBITION.

See DIVISION COURTS.

PROMISSORY NOTES.

Waiver of Protest by Endorser
—Notice that Note Unpaid at
Maturity Given Orally by Payee
—Promise of Endorser to Pay
and Request to Do Nothing—
Waiver in Favour of all Holders.

BANK OF TORONTO V. BEN-
NETT, 326.

See COMPANY, 5.

PROMOTER.

See COMPANY, 4.

PROOFS OF LOSS.

See INSURANCE, 3.

PROSPECTUS.

See BANKRUPTCY, 4.

PROVINCIAL TAXATION.

See CONSTITUTIONAL LAW, 2.

PROXY.

See CRIMINAL LAW, 2.

PUBLIC UTILITIES COMMISSION.

See MUNICIPAL CORPORATIONS, 4.

QUEBEC LAW.

See BANKRUPTCY, 6.

RAILWAY.

1. *Canadian National Railway Company—Powers of Expropriation — Dominion Railway Act, 1919, sec. 287—Order of Board of Railway Commissioners—Expropriation Act.*

BOLAND v. CANADIAN NATIONAL RAILWAY Co., 619.

2. *Motor Truck Run down by Train at Level Highway Crossing—Injury to Driver and Death of Passenger—Actions for Damages and Compensation—Trial—Findings of Jury—Condition of Crossing — “Whistle did not Blow”—Overwhelming Affirmative Evidence of Credible Witnesses that Whistle Duly Blown—Verdict Set aside and Actions Dismissed.*

ALYEA v. CANADIAN NATIONAL RAILWAY Co., HODGES v. CANADIAN RAILWAY Co., 665.

See BAILMENT — LANDLORD AND TENANT, 2—NEGLIGENCE, 1.

RAPE.

See CRIMINAL LAW, 6.

RATIFICATION.

See CONTRACT, 3.

RECEIVING ORDER.

See BANKRUPTCY, 5.

REGISTRY LAWS.

See VENDOR AND PURCHASER, 2.

RELEASE.

See COMPANY, 2, 4 — INSURANCE, 5.

RENT.

See LANDLORD AND TENANT, 2.

REPORT.

See CONTRACT, 1.

REPUDIATION.

See MASTER AND SERVANT.

RES JUDICATA.

See LANDLORD AND TENANT, 3.

RESCISSION.

See COMPANY, 1.

RESILIATION.

See BANKRUPTCY, 6.

RESOLUTION.

See MUNICIPAL CORPORATIONS, 4.

RESTRICTIONS.

See COVENANT, 1, 2.

REVENDECATION.

See BANKRUPTCY, 6.

REVENUE.

Excise Tax — Special War Revenue Act, 1915—Amending Act, 12 & 13 Geo. V. ch. 47, secs.

REVENUE—(Continued.)

13, 17—*Charge upon Property of Bankrupt Debtor—Customer of Bank—Moneys Collected by Bank upon Bills Drawn by Customer upon Purchasers from him—Whether Assets of Debtor — Tax Payable by Seller—Liability of Purchasers.*

GOODMAN AND ATTORNEY-GENERAL FOR CANADA v. BANK OF TORONTO, 109.

See BANKRUPTCY, 3.

REVIVOR.

Action of Tort—Trustee Act, sec. 41(3)—Limitation of Time for Bringing of Action by Personal Representative — Whether Applicable to Maintenance of Action Brought before Death of Injured Person—Rule 305.

MACKIE v. HAMILTON BOARD OF HEALTH, 93.

RULES.

(Rules of the Supreme Court of Canada.)

Rule 2: POST v. LANGELL, 200.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rule 100: RE CLUFF BROTHERS, 662.

Rules 142, 143: AMERICAN FOOTWEAR CO. v. LANCASHIRE AND GENERAL ASSURANCE CO., 305.

Rule 228: BEAU MONDE LADIES' TAILORING CO. v. GARRETT, 256.

Rule 305: MACKIE v. HAMILTON BOARD OF HEALTH, 93.

RULES—(Continued.)

Rule 371: MUSSON v. HEAD, 38.

Rule 398(3): WILSON v. KINNEAR, 679.

Rule 499: STONE v. KOHEN, 579.

Rules 580-584: BEAU MONDE LADIES' TAILORING CO. v. GARRETT, 256.

Rule 605: RE DEMPSEY AND MIDLAND LOAN AND SAVINGS CO., 627.

Rule 608: SEYMOUR v. PRATT, 278.

Rule 649: DOMINION LOOSE LEAF CO. LTD. v. MANUEL, 84.

Rules 665, 666: KOHEN v. CULLEY BREAY & DOVER LTD., 533.

(Division Court Rules.)

Rules 3, 37: RE ORR v. KREPSKY, 353.

(Bankruptcy Rules.)

Rules 94, 152: RE CLUFF BROTHERS, 662.

Rule 108A: RE BRYANT ISARD & Co., 471.

SALE OF GOODS.

1. Bulk Sales Act, 7 Geo. V. ch. 33—*Sale by Farmer of Chattels on Farm—Whether Act Applicable — Effect of Non-compliance with Requirements of Act —Sale not Attacked within 60 Days—Action by Trustee in Bankruptcy of Vendor's Estate for Price of Goods—Set-off by Purchaser of Debt Due by Vendor —Sale not Invalid under Bankruptcy Act.*

ALLEN v. PATTERSON, 287.

SALE OF GOODS—(Con.)

2. *Conditional Sale — Default in Payment—Repossession and Resale — Commission Paid to Agent for Making Resale — Whether Chargeable as Part of Sale - expenses — Interlocutory Costs—Set-off against Amount Recovered in Action—Equitable Right—Determination at Trial—Rules 665, 666.*

KOHEN V. CULLEY BREAY & DOVER LTD., 533.

3. *Notice by Unpaid Vendor to Carrier to Stop Delivery—Delivery by Carrier to Consignee notwithstanding Notice —Action by Vendor against Carrier — Right of Stoppage in Transitu—Sale of Goods Act, 1920, 10 & 11 Geo. V. ch. 40, secs. 39, 43, 44—Consignee, whether Agent of Purchaser —Presumption—Evidence —Sufficiency of Notice—Meaning of "Claim" in sec. 45(1).*

NEW ONTARIO COLONIZATION CO. LTD. V. GRAND TRUNK RAILWAY SYSTEM, 244.

See BANKRUPTCY, 6 — CONTRACT, 3.

SALE OF LAND.

See VENDOR AND PURCHASER.

SALES TAX.

See BANKRUPTCY, 3.

SCALE OF COSTS.

See COSTS, 1.

SCHOOLS.

See MUNICIPAL CORPORATIONS, 2.

SCIENTI NON FIT INJURIA.

See NEGLIGENCE, 2.

SECURITIES.

See COMPANY, 3, 5.

SENTENCE.

See CRIMINAL LAW, 5.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

Debt Owed by Partnership to Bank — Joint Indebtedness of Partners—Moneys in Bank to Credit of Individual Partner Hypothecated to Bank as Security for Joint Indebtedness—Equitable Considerations.

CLARKSON V. SMITH & GOLDBERG, 251.

See SALE OF GOODS, 1.

SETTLEMENT DUTIES.

See CROWN.

SHARES AND SHAREHOLDERS.

See BANKS AND BANKING — BROKERS—COMPANY, 1, 4, 5.

SHIPMENT OF GRAIN.

See BAILMENT.

SOLICITOR.

Bills of Costs Rendered more than a Year before Action Brought to Recover Amount—Absence of Itemised Charges—Amendment to Solicitors Act, sec.

SOLICITOR—(Continued.)

34, by 10 & 11 Geo. V. ch. 45, sec. 2—*No Order for Taxation Obtained within the Year—Sec. 36 (1) of Principal Act—Order for Taxation Made by Trial Judge under General Jurisdiction of Court—Discretion—Appeal.*

ARNOLDI V. TREMAINE, 310.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 1, 2.

STATUTE OF FRAUDS.

See CONTRACT, 2 — VENDOR AND PURCHASER, 1, 2.

STATUTE OF LIMITATIONS.

See COMPANY, 2—LIMITATION OF ACTIONS.

STATUTE OF USES.

See DOWER.

STATUTES.

27 Hen. VIII. ch. 10 (Statute of Uses): *Re HAZELL*, 166.

30 & 31 Vict. ch. 3, sec. 92(2) (Imp.) (British North America Act): *Re McLEOD AND CITY OF WINDSOR*, 15.

R.S.O. 1877, ch. 59, sec. 2 (Petition of Right Act): *FITZPATRICK V. THE KING*, 178.

R.S.O. 1887, ch. 102, sec. 13 (Mortgages Act): *Re STAIR AND YOLLES*, 338.

R.S.O. 1887, ch. 110, sec. 17 (Trustee Act): *Re STAIR AND YOLLES*, 338.

R.S.O. 1897, ch. 51, sec. 26(7) (Judicature Act): *FITZPATRICK V. THE KING*, 178.

R.S.O. 1897, ch. 235, sec. 40 (Municipal Waterworks Act): *CAMPBELL FLOUR MILLS CO. LTD. V. CITY OF PETERBOROUGH*, 458.

STATUTES—(Continued.)

R.S.C. 1906, ch. 15, sec. 180 (1) (f) (Inland Revenue Act): *REX V. BUSCH*, 248.

R.S.C. 1906, ch. 119, secs. 2 (d), (g), 21(3), 31, 56, 60, 74 (Bills of Exchange Act): *IMPERIAL BANK OF CANADA V. DENNIS*, 203.

R.S.C. 1906, ch. 125 (Trade Unions Act): *SELLORS V. WOODRUFF*, 582.

R.S.C. 1906, ch. 139, sec. 75 (Supreme Court Act): *POST V. LANGELL*, 200.

R.S.C. 1906, ch. 143 (Expropriation Act): *BOLAND V. CANADIAN NATIONAL RAILWAY CO.*, 619.

R.S.C. 1906, ch. 146, sec. 756 (Criminal Code): *REX V. CHOMIK*, 334.

R.S.C. 1906, ch. 146, sec. 1014: *REX V. WEST*, 446.

6 Edw. VII. ch. 15 (O.) (Transmission of Electrical Power to Municipalities): *CAMPBELL FLOUR MILLS CO. LTD. V. CITY OF PETERBOROUGH*, 458.

7 Edw. VII. ch. 82 (O.) (City of Peterborough): *CAMPBELL FLOUR MILLS CO. LTD. V. CITY OF PETERBOROUGH*, 458.

3 & 4 Geo. V. ch. 9, secs. 54, 112, 153 (a), (b), (2) (D.) (Bank Act): *REX V. CLARENCE F. SMITH*, 383; *REX V. BARNARD*, 397; *REX V. GOUGH*, 426.

3 & 4 Geo. V. ch. 12, sec. 5(O.) (Power Commission Act): *CAMPBELL FLOUR MILLS CO. LTD. V. CITY OF PETERBOROUGH*, 458.

R.S.O. 1914, ch. 32, secs. 63, 64, 65, 84, 133 (Mining Act): *Re HEATH AND ROSE*, 67.

R.S.O. 1914, ch. 39, sec. 16 (Power Commission Act): *BEACH V. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO*, 603.

R.S.O. 1914, ch. 54 (Privy Council Appeals Act): *POST V. LANGELL*, 200.

R.S.O. 1914, ch. 56, sec. 3 (Judicature Act): *FITZPATRICK V. THE KING*, 178.

R.S.O. 1914, ch. 56, sec. 28: *IMERSON V. NIPISSING CENTRAL RAILWAY CO.*, 588.

R.S.O. 1914, ch. 59, sec. 22, subsec. 1, cl. (i) (County Courts Act): *DOMINION LOOSE LEAF CO. LTD. V. MANUEL*, 84.

STATUTES—(Continued.)

R.S.O. 1914, ch. 62, secs. 32, 33, 50, 54 (Surrogate Courts Act): *HARRIS v. GALLIMORE*, 673.

R.S.O. 1914, ch. 63, secs. 34, 85, 87, 97(1), (4) (Division Courts Act): *Re ORR v. KREPSKY*, 353.

R.S.O. 1914, ch. 70, sec. 4 (Dower Act): *Re HAZELL*, 166.

R.S.O. 1914, ch. 71, sec. 11(1) (Libel and Slander Act): *GEARY v. ALGER*, 218.

R.S.O. 1914, ch. 75 (Limitations Act): *BABBITT v. CLARKE*, 60; *SHATFORD v. FOLEY GOLD MINES CO. LTD.*, 221.

R.S.O. 1914, ch. 76, sec. 10 (Evidence Act): *ROBINS v. NATIONAL TRUST CO.*, 46; *BUTTRUM v. UDELL*, 97.

R.S.O. 1914, ch. 102 (Statute of Frauds): *DOYLE v. MCKINNON*, 104; *LEFTLEY v. MOFFAT*, 260; *MUSSON v. HEAD*, 38.

R.S.O. 1914, ch. 109, sec. 57 (Conveyancing and Law of Property Act): *Re BUTTON*, 161.

R.S.O. 1914, ch. 112, sec. 11, subsecs. 2, 3 (Mortgages Act): *Re OLLMANN*, 340.

R.S.O. 1914, ch. 121, sec. 4 (1), (2) (Trustee Act): *Re NATIONAL TRUST CO. AND McLAUGHLIN*, 319.

R.S.O. 1914, ch. 121, sec. 41(3): *MACKIE v. HAMILTON BOARD OF HEALTH*, 93.

R.S.O. 1914, ch. 124, sec. 67 (Registry Act): *Re HAZELL*, 166.

R.S.O. 1914, ch. 124, sec. 67: *Re HAZELL*, 290.

R.S.O. 1914, ch. 135 (Bills of Sale and Chattel Mortgage Act): *Re HUDSON FASHION SHOPPE LTD.*, 506.

R.S.O. 1914, ch. 136 (Conditional Sales Act): *Re HUDSON FASHION SHOPPE LTD.*, 506.

R.S.O. 1914, ch. 136, secs. 3, 9: *MURPHY WALL BED CO. OF DETROIT v. LEVIN*, 105.

R.S.O. 1914, ch. 148, secs. 15, 36 (Marriage Act): *DOYLE v. DEADY*, 44.

R.S.O. 1914, ch. 149, sec. 42 (Married Women's Property Act): *DISNEY v. HOWICH*, 365.

R.S.O. 1914, ch. 155, secs. 34, 40, and Part III. (Landlord and Tenant Act): *Re DOTY AND MARKS*, 623.

STATUTES—(Continued.)

R.S.O. 1914, ch. 159, secs. 34(3), 36(1) (Solicitors Act): *ARNOLDI v. TREMAINE*, 310.

R.S.O. 1914, ch. 163, secs. 27, 28 (Dentistry Act): *Re DAVIDSON AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO*, 222.

R.S.O. 1914, ch. 178, secs. 101(1), 105 (Companies Act): *MARTIN v. CLARKSON*, 499.

R.S.O. 1914, ch. 183, secs. 66, 68 (Insurance Act): *AMERICAN FOOTWEAR CO. v. LANCASHIRE AND GENERAL ASSURANCE CO.*, 305.

R.S.O. 1914, ch. 183, secs. 155, 198(d) (1): *HOLDAWAY v. BRITISH CROWN ASSURANCE CORPORATION LTD.*, 70.

R.S.O. 1914, ch. 183, secs. 171(3), 178(2), 179: *Re SEXSMITH*, 283.

R.S.O. 1914, ch. 183, sec. 172 (1): *MILES v. ONTARIO EQUITABLE LIFE INSURANCE CO.*, 343.

R.S.O. 1914, ch. 183, sec. 199: *LONDON LOAN AND SAVINGS CO. OF CANADA LTD. v. UNION INSURANCE CO. OF CANTON LTD.*, 651.

R.S.O. 1914, ch. 184, sec. 20 (Loan and Trust Corporations Act): *Re NATIONAL TRUST CO. AND McLAUGHLIN*, 319.

R.S.O. 1914, ch. 186 (Ontario Railway and Municipal Board Act): *Re TOWNSHIP OF YORK AND TOWNSHIP OF NORTH YORK*, 644.

R.S.O. 1914, ch. 192 (Municipal Act): *Re TOWNSHIP OF YORK AND TOWNSHIP OF NORTH YORK*, 644.

R.S.O. 1914, ch. 192, sec. 248: *CAMPBELL FLOUR MILLS CO. LTD. v. CITY OF PETERBOROUGH*, 458.

R.S.O. 1914, ch. 195, secs. 2(ka), 13(3), (4) (Assessment Act): *Re McLEOD AND CITY OF WINDSOR*, 15.

R.S.O. 1914, ch. 195, sec. 5: *Re FOX AND CITY OF WINDSOR*, 243.

R.S.O. 1914, ch. 204, sec. 35 (Public Utilities Act): *CAMPBELL FLOUR MILLS CO. LTD. v. CITY OF PETERBOROUGH*, 458.

R.S.O. 1914, ch. 207, sec. 13 (Motor Vehicles Act): *JAMES v. CITY OF TORONTO*, 322.

4 Geo. V, ch. 87(O.) (City of Peterborough): *CAMPBELL FLOUR MILLS CO. LTD. v. CITY OF PETERBOROUGH*, 458.

STATUTES—(Continued.)

5 Geo. V. ch. 8(D.) (Special War Revenue Act) : *Re* CALCUS Co. LTD., 272.

5 Geo. V. ch. 8, sec. 19 BBB(1) (D.) : GOODMAN AND ATTORNEY-GENERAL FOR CANADA v. BANK OF TORONTO, 109.

5 Geo. V. ch. 21, sec. 1(O.) (Amending Mortgages Act) : *Re* OLLMANN, 340.

7 Geo. V. ch. 33, secs. 4, 5, 6, 9(O.) (Bulk Sales Act) : ALLEN v. PATTERSON, 287.

7 Geo. V. ch. 49, sec. 10(O.) (Amending Motor Vehicles Act) : JAMES v. CITY OF TORONTO, 322.

9 Geo. V. ch. 35, secs. 2, 4(O.) (Amending Marriage Act) : DOYLE v. DEADY, 44.

9 & 10 Geo. V. ch. 36(D.) (Bankruptcy Act) : ALLEN v. PATTERSON, 287.

9 & 10 Geo. V. ch. 36, secs. 2 (o), (v), 4(6), 8(1), 75(D.) : *Re* STONE, 640.

9 & 10 Geo. V. ch. 36, secs. 2(o), (aa), 4(1), 69, 70(2) : *Re* CLUFF BROTHERS, 662.

9 & 10 Geo. V. ch. 36, secs. 20, 40(D.) : *Re* BRYANT ISARD & Co., 471.

9 & 10 Geo. V. ch. 68, sec. 257(D.) (Railway Act) : BOLAND v. CANADIAN NATIONAL RAILWAY Co., 619.

10 & 11 Geo. V. ch. 40, secs. 39, 43, 44, 45(1)(O.) (Sale of Goods Act). NEW ONTARIO COLONIZATION Co. LTD. v. GRAND TRUNK RAILWAY SYSTEM, 244.

10 & 11 Geo. V. ch. 45, sec. 2(O.) (Amending Solicitors Act) : ARNOLDI v. TREMAINE, 310.

11 Geo. V. ch. 17(O.) (Natural Gas Conservation Act) : TOWNSHIP OF SANDWICH EAST v. UNION NATURAL GAS Co., 656.

11 Geo. V. ch. 21(O.) (Amending Marriage Act) : DOYLE v. DEADY, 44.

11 Geo. V. ch. 54(O.) (Children of Unmarried Parents Act) : *Re* BROWN AND ARGUE, 297.

12 & 13 Geo. V. ch. 23(O.) (Natural Gas Conservation Act) : TOWNSHIP OF SANDWICH EAST v. UNION NATURAL GAS Co., 656.

12 & 13 Geo. V. ch. 47, secs. 13, 17 (D.) (Amending Special War Revenue Act) : GOODMAN AND ATTORNEY-

STATUTES—(Continued.)

GENERAL FOR CANADA v. BANK OF TORONTO, 109.

12 & 13 Geo. V. ch. 47, sec. 17(D.) : *Re* CALCUS Co. LTD., 272.

12 & 13 Geo. V. ch. 53, sec. 2(O.) (Amending Conveyancing and Law of Property Act) : *Re* BUTTON, 161.

12 & 13 Geo. V. ch. 61, sec. 14(O.) (Amending Insurance Act) : HOLDAWAY v. BRITISH CROWN ASSURANCE CORPORATION LTD., 70.

12 & 13 Geo. V. ch. 72, secs. 8, 9, 10(O.) (Consolidated Municipal Act) : CAMPELL FLOUR MILLS Co. LTD. v. CITY OF PETERBOROUGH, 458.

12 & 13 Geo. V. ch. 72, sec. 53(1) (j) (O.) : REX EX REL. SCROGGIE v. ROBB, 23.

12 & 13 Geo. V. ch. 78, secs. 2, 12 (O.) (Amending Assessment Act) : *Re* MCLEOD AND CITY OF WINDSOR, 15.

12 & 13 Geo. V. ch. 140, sec. 4(1) (a), (2)(O.) (Township of York) : *Re* TOWNSHIP OF YORK AND TOWNSHIP OF NORTH YORK, 644.

13 & 14 Geo. V. ch. 29(O.) (Assignment of Book Debts Act) : DENISON v. UNION BANK OF CANADA, 374.

13 & 14 Geo. V. ch. 30, secs. 8(13), 18, 19(O.) (Mechanics and Wage-Earners Lien Act) : MARTELLO v. BARNET, 670.

13 & 14 Geo. V. ch. 31, sec. 23(D.) (Amending Bankruptcy Act) : *Re* BRYANT ISARD & Co., 471.

13 & 14 Geo. V. ch. 32, sec. 88(D.) (Bank Act) : DENISON v. UNION BANK OF CANADA, 374.

13 & 14 Geo. V. ch. 32, sec. 53(a) (D.) : *Re* HOME BANK OF CANADA, NATIONAL TRUST Co.'s CASE, 27.

13 & 14 Geo. V. ch. 41, sec. 9(D.) (Amending Criminal Code) : REX v. WEST, 446.

13 & 14 Geo. V. ch. 48, sec. 44(O.) (Highway Traffic Act) : JAMES v. CITY OF TORONTO, 322.

14 Geo. V. ch. 32(O.) (Contributory Negligence Act) : IMERSON v. NIPISSING CENTRAL RAILWAY Co., 588.

14 Geo. V. ch. 50, sec. 142 (Ontario Insurance Act) : BENNETT v. PEATTIE, 233.

STAY OF PROCEEDINGS.*See* APPEAL.**STOPPAGE IN TRANSITU.***See* SALE OF GOODS, 3.**STORAGE.***See* BAILMENT.**STREET RAILWAY.***See* NEGLIGENCE, 1.**SUPREME COURT OF
CANADA.***See* APPEAL.**SURROGATE COURTS.***See* WILL, 1.**SURVIVING TRUSTEE.***See* TRUSTS AND TRUSTEES, 1.**SURVIVORSHIP.**

Husband and Wife Killed in same Railway Disaster—Wife (if Living at Death of Husband) Named as Beneficiary in Policies of Insurance—Evidence of Medical Witnesses as to whether Wife still Alive after Husband was Dead—Finding of Trial Judge—Reversal on Appeal—Costs—Presumption of Survivorship—Rules of Common and Civil Law—Application to Railway Disaster—Rights of Beneficiary Dying before Maturity of Insurance Contract—Ontario Insurance Act, 1924, 14 Geo. V. ch. 50, sec. 142.

BENNETT V. PEATTIE, 233.

See DEED—HUSBAND AND WIFE.**TAXATION OF COSTS.***See* COSTS, 1, 2—SOLICITOR.**TAXES.***See* ASSESSMENT AND TAXES—CONSTITUTIONAL LAW, 2—REVENUE.**TENANT.***See* LANDLORD AND TENANT.**TESTAMENTARY CAPACITY.***See* WILL, 2.**TIME.***See* REVIVOR—SALE OF GOODS. 1—SOLICITOR.**TITLE TO LAND.***See* LIMITATION OF ACTIONS.**TORT.***See* REVIVOR.**TRADE MARK.***Registration—Invalidity—Descriptive Design—Pictorial Representation—Mark Used in Connection with Sale of Goods of Particular Kind.*

FROST STEEL AND WIRE CO. LTD. V. LUNDY, 494.

TRADE UNION.*Moneys Collected from Members of Branch—Trust-fund—Repudiation of Canadian Society and Branches by Parent Society in England—Benefits—Refusal to Pay—Whether Parent Society*

TRADE UNION—(Con.)

Entitled to Funds of Branch — Trade Unions Act, R.S.C. 1906, ch. 125, sec. 5.

SELLORS V. WOODRUFF, 582.

TRESPASS.

See LIMITATION OF ACTIONS, 1, 2—MUNICIPAL CORPORATIONS, 3—NEGLIGENCE, 1.

TRIAL.

Jury Notice — Striking out — Order Made by Judge at Toronto Jury Sitings—Discretion — Appeal—Rule 398(3).

WILSON V. KINNEAR, 679.

See CRIMINAL LAW, 6—EVIDENCE—JUDGMENT—RAILWAY, 2 —SALE OF GOODS, 2.

TRUST COMPANY.

See TRUSTS AND TRUSTEES, 1.

TRUST FUND.

See TRADE UNION.

TRUSTS AND TRUSTEES.

Surviving Trustee — Appointment by, of Trust Company as Trustee in his Stead—Invalidity —Trustee Act, sec. 4(1), (2)—Loan and Trust Corporations Act, sec. 20—Appointment by Order of Court nunc pro tunc.

RE NATIONAL TRUST CO. AND McLAUGHLIN, 319.

2. Will — *Direction to Sell Land—Absence of Authority to Mortgage — Money Raised by Trustees upon Mortgage to Improve Property and Procure Ad-*

**TRUSTS AND TRUSTEES—
(Continued.)**

vantageous Sale—Whether Breach of Trust — Money Retained by Trustees at Request of Cestui que Trust.

BANNERMAN V. BINKS, 265.

See BANKRUPTCY—BANKS AND BANKING — CONSTITUTIONAL LAW, 2 — EXECUTORS AND ADMINISTRATORS—WILL, 4.

VENDOR AND PURCHASER.

1. *Agreement for Exchange of Properties—Action for Specific Performance—Agreement Signed by Husband of Owner of City Property — Agency—Parol Evidence to Prove—Admissibility—Statute of Frauds, R.S.O. 1914, ch. 102, sec. 5—Contract Containing no Special Description or Assertion of Property—Part of Subject-matter Sold under Order of Court pendente Lite—Rule 371 —Terms of Order—Preservation of Rights of all Parties—Practice —Sale not a Bar to Judgment for Specific Performance.*

MUSSON V. HEAD, 38.

2. *Contract for Sale of Land—Correspondence — Description of Property—Statute of Frauds—Id Certum est quod Reddi Certum potest—Action for Specific Performance—Lis Pendens—Registration of Certificate after Execution of Conveyance to another Purchaser—Refusal to Make New Purchaser Party to Action —*

VENDOR AND PURCHASER—(Con.)

Damages in Lieu of Specific Performance—Amendment.

LEFTLEY v. MOFFAT, 260.

3. *Exchange of Lands—Misrepresentations—Failure to Prove—Assumption of Mortgages—Understanding of Parties—Consideration—Implied Contract—Equitable Obligation—Married Woman—Liability—Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 42—Indemnity—Form of Judgment.*

DISNEY v. HOWICH, 365.

VERDICT.

See RAILWAY, 2.

WAGES.

See COMPANY, 2.

WAIVER.

See DIVISION COURTS.—LANDLORD AND TENANT, 3—PROMISSORY NOTES.

WAR REVENUE ACT.

See BANKRUPTCY, 3 — REVENUE.

WAREHOUSE.

See NEGLIGENCE, 2, 3.

WAREHOUSE RECEIPTS.

See BANKRUPTCY, 2.

WAREHOUSEMEN.

See BAILMENT.

WARRANT.

See CRIMINAL LAW, 5.

WATER COMMISSIONERS.

See MUNICIPAL CORPORATIONS, 4.

WATER RIGHTS.

See CROWN.

WAY.

See LIMITATION OF ACTIONS, 2.

WILL.

1. *Action to Establish Will, Commenced in Surrogate Court and Removed into Supreme Court—Declaration of Invalidity of Will—Jurisdiction of Supreme Court—Surrogate Courts Act, secs. 32, 33—Issue as to Validity of Gift inter Vivos—Absence of Personal Representative of Deceased Donor—Character of Executor Named in Will—Grounds for Refusal to Make Grant to—Secs. 50 and 54 of Act—Appeal—Costs.*

HARRIS v. GALLIMORE, 673.

2. *Admission to Probate—Action to Set aside Probate—Delay in Launching—Mental Incapacity of Testator—Failure to Prove—Suspicious Circumstances Surrounding Execution of Will—Failure to Shew—Onus of Proof—Application for New Trial—"Opinion Evidence"—Evidence Act, sec. 10—Limitation of Number of Witnesses—*

WILL—(Continued.)

Evidence of Professional Witness—Objection to Portion as Inadmissible—Evidence of a Defendant Taken on Commission—Objection to Admission at Trial—Discretion of Trial Judge—Discovery of Fresh Evidence—Corroborative Testimony—Inadmissibility.

ROBINS V. NATIONAL TRUST Co., 46.

3. *Construction — Benefits Given to Widow—Whether in Lieu of Dower—Election — Life Insurance — Change of Beneficiary within Preferred Class—Ontario Insurance Act, secs. 171(3), 178(2), 179.*

RE SEXSMITH, 283.

4. *Construction — Bequest of "Entire Property" to Wife with "Power of Control"—"Wish" that Sister should "Inherit what Remains" at Death of Wife—Validity as Gift — Certainty — Trust—Interpretation of Words in Wills.*

RE SCOTT, 381.

5. *Construction—Devise to Infant Nephew for Life and at his Death to his Sons and Daughters — Devise over in Event of Nephew Having no Sons or Daughters — Estate Tail — Bequest of Personality—Charge on Estate of Nephew of Sum of Money to "Help Pay Legacies."*

RE HAIG, 129.

6. *Construction — Residue of Estate Given to Wife for her*

WILL—(Continued.)

"Use and Benefit"—Direction that she Leave "Balance" if any to Mission Fund—Impossibility of Making Gift over of Part of what had been Given Absolutely.

RE MOORE, 530.

7. *Life-estate Given to Widow with Limited Power of Appointment — Whether Exercised by Will of Donee—Evidence—Intention of Donee—Life-estate in Personality, including Money — Assets of Estates of Testator and of Donee of Power—Property "Expended" and "Accretions" to Property—"Possessed of or Entitled to."*

RE KING, 144.

8. *Mutual Wills Made by Father and Son—Purchase by Son of Property of Father—Alleged Oral Agreement of Father not to Revoke Will—Establishment against Executors of Father—Onus—Parol Evidence—Animus Contrahendi — Corroboration.*

BENN V. HAWTHORNE, 557.

See BANKS AND BANKING—
EXECUTORS AND ADMINISTRATORS
—TRUSTS AND TRUSTEES, 2.

WINDING-UP.

See BANKS AND BANKING—
COMPANY, 1.

WITNESSES.

See EVIDENCE.

WORDS.

"Accretions:" *Re* KING, 144.

"Assigns:" BESINNETT v. WHITE, 171.

"Balance:" *Re* MOORE, 530.

"Beneficial to the Persons Principally Concerned:" *Re* BUTTON, 161.

"Bodily Injury:" MILES v. ONTARIO EQUITABLE LIFE INSURANCE Co., 343.

"Brought:" MACKIE v. HAMILTON BOARD OF HEALTH, 93.

"Child Born out of Wedlock:" *Re* BROWN AND ARGUE, 297.

"Claim:" NEW ONTARIO COLONIZATION CO. LTD. v. GRAND TRUNK RAILWAY SYSTEM, 244.

"Condition of the Bank:" REX v. GOUGH, 426.

"Difficulty in or about the Execution or Enforcement of a Judgment:" BEAU MONDE LADIES' TAILORING CO. v. GARRETT, 256.

"Disgraceful:" *Re* DAVIDSON AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, 222.

"Dispute:" *Re* HEATH AND ROSE, 67.

"Entire Property:" *Re* SCOTT, 381.

"Event Insured against:" MILES v. ONTARIO EQUITABLE LIFE INSURANCE Co., 343.

"Expended:" *Re* KING, 144.

"Fair and Accurate Report:" GEARY v. ALGER, 218.

"Feigned Issue:" *Re* HAZELL, 290.

WORDS—(Continued.)

"Financial Position of the Bank:" REX v. GOUGH, 426.

"Goods:" MURPHY WALL BED CO. OF DETROIT v. LEVIN, 105.

"Household Furniture:" MURPHY WALL BED CO. OF DETROIT v. LEVIN, 105.

"Improper Conduct in a Professional Respect:" *Re* DAVIDSON AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, 222.

"In Connection with such Holding:" *Re* HOME BANK OF CANADA, NATIONAL TRUST Co.'S CASE, 27.

"Infamous:" *Re* DAVIDSON AND ROYAL COLLEGE OF DENTAL SURGEONS OF ONTARIO, 222.

"Inherit:" *Re* SCOTT, 381.

"Knowledge and Belief:" REX v. GOUGH, 426.

"Member of a Public or Separate School Board:" REX *ex rel.* SCROGGIE v. ROBB, 23.

"Named:" *Re* HOME BANK OF CANADA, NATIONAL TRUST Co.'S CASE, 27.

"Negligently:" REX v. BARNARD, 397.

"Opinion Evidence:" ROBINS v. NATIONAL TRUST Co., 46; BUTTRUM v. UDELL, 97.

"Or for some other Cause:" *Re* OLLMANN, 340.

"Order to the Contrary:" DOMINION LOOSE LEAF Co. LTD. v. MANUEL, 84.

"Outgoing Directors:" REX v. CLARENCE F. SMITH, 383.

WORDS—(Continued.)

"Owned or Controlled:" REX
V. BUSCH, 248.

"Power of Control:" Re SCOTT,
381.

"Sons or Daughters:" Re
HAIG, 129.

"Stoppage in Transitu:" NEW
ONTARIO COLONIZATION CO. LTD.
V. GRAND TRUNK RAILWAY SYS-
TEM, 244.

"Sufficient Cause:" Re STONE,
640.

WORDS—(Continued.)

"Trespasser:" JAMES V. CITY
OF TORONTO, 322.

"Use and Benefit:" Re MOORE,
530.

"Wall-beds:" MURPHY WALL
BED CO. OF DETROIT V. LEVIN,
105.

"What Remains:" Re SCOTT,
381.

"Wish:" Re SCOTT, 381.

WRONGFUL DISMISSAL.

See MASTER AND SERVANT.



